

IN THE HIGH COURT OF LESOTHO
(Constitutional Court)

HELD AT MASERU

CONS CASE NO. 14/19

TEBOHO TLOKOTSI

1ST APPLICANT

TUMO RAMONAHENG

2ND APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

1ST RESPONDENT

**DIRECTORATE ON CORRUPTION &
ECONOMIC OFFENCES (DCEO)**

2ND RESPONDENT

DIRECTOR GENERAL (DCEO)

3RD RESPONDENT

HIS WORSHIP MR. QOBOLO N.O

4TH RESPONDENT

**CLERK OF COURT – MASERU
MAGISTRATE’S COURT**

5TH RESPONDENT

THE ATTORNEY GENERAL

6TH RESPONDENT

THE PUBLIC ACCOUNTS COMMITTEE

7TH RESPONDENT

HON. SELIBLE MOCHOBOROANE

8TH RESPONDENT

THE CLERK OF THE NATIONAL ASSEMBLY

9TH RESPONDENT

THABISO THIBELI

10TH RESPONDENT

Neutral Citation: Teboho Tlokotsi & Another v Director of Prosecutions & 9 others [2022] LSHC 59 Const.(15th December,2022)

CORUM:

**S.P. SAKOANE CJ, K. L MOAHLOLI
and A.R. MATHABA JJ**

DATE OF HEARING:

22nd and 29th NOVEMBER 2021

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SUMMARY:

Constitutional litigation – Collateral challenge to vindicate fundamental human rights and freedoms – Applicants claiming that they suffered pre – trial prejudices as a result of Public Accounts Committee summoning and questioning Director General of the Directorate on Corruption and Economic Offences and the Director of Public Prosecutions about their criminal case – Applicants alleging interference with prosecutorial powers and discrimination by the Director General who charged them to the exclusion of co – suspects contrary to the directive of the Director of Public Prosecutions – Director of Public Prosecutions does not account to PAC in discharging her constitutional mandate - The Directorate on Corruption and Economic Offences is not an agent of the Director of Public Prosecutions, but exercises its own prosecutorial powers – A claim for discrimination must be brought within the ambit of section 18 of the Constitution – Collateral challenge requires exceptional circumstances – Application dismissed.

ANNOTATIONS:

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Likeleli Tampane v Speaker of the National Assembly & Others (CIV/APN/184/18) [2018] LSHC 20

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Matsoso v. Lesotho Tourist Board (CIV/APN/472/99) [2000] LSHC 79

Metsing and Another v. Attorney General and Others (No.2) [2021] LSHC 123 Civ (18 November 2021)

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Criminal Procedure and Evidence Act No.7 of 1981 as amended

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Parliamentary Powers and Privileges Act No. 8 of 1994

Prevention of Corruption and Economic Offences (Amendment) Act No.8 of 2006

Prevention of Corruption and Economic Offences Act No. 5 of 1999

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Constitutional Litigation Rules Legal Notice No. 194 of 2000

High Court Rules Legal Notice No.9 of 1980

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International Covenant on Civil and Political Rights, 1966

Universal Declaration of Human Rights, 1948

JUDGMENT

MATHABA J:

I. INTRODUCTION

[1] This constitutional motion is a sequel to a failed application by the applicants before the Magistrate’s Court on 4th November 2019. The applicants were arraigned on charges of contravening the **Prevention of Corruption and Economic Offences Act No.5 of 1999**, its **2006 Amendment Act No. 8**, (“*PC&EO Act*”), and the **Money Laundering and Proceeds of Crime Act No.4 of 2008**, (“*MLP Act*”).

[2] On 12 November 2019, eight days after the dismissal of the referral application, the applicants instituted the constitutional motion on an urgent basis. However, the Court did not hear it on an urgent basis. In the meantime, the applicants instituted interlocutory application to amend the notice of motion with a view to introducing two substantive prayers which are disclosed below.

[3] The notice of motion has a litany of prayers, most of which the applicants abandoned at the commencement of argument. As a result, save for costs,

the applicants are only pursuing the following substantive prayers in the notice of motion, *verbatim et literatim*:

- “7. That it be declared that the summoning and consequent presentation of evidence involving the **APPLICANTS** by **THE DIRECTOR OF PUBLIC PROSECUTIONS** is a violation of **SECTION 12** read together with **SECTION 99 (6)** of **THE CONSTITUTION OF LESOTHO 1993 (As amended)**.
9. That it be declared that **THE PUBLIC ACCOUNTS COMMITTEE** has no jurisdiction to interrogate and or probe issues that have to do with criminal investigations conducted by the **DIRECTORATE ON CORRUPTION & ECONOMIC OFFENCES** or to interfere with the prosecutorial powers of **THE DIRECTOR OF PUBLIC PROSECUTIONS**.
16. That it be declared that the decision of the **2ND RESPONDENT (DIRECTORATE ON CORRUPTION AND ECONOMIC OFFENCES)** and or **3RD RESPONDENT (DIRECTOR GENERAL OF DIRECTORATE OF CORRUPTION AND ECONOMIC OFFENCES)** of charging the **1ST and 2ND APPLICANTS** to the exclusion of **LIKELELI TAMPANE, ‘MAFUSI MOSAMO and MOTENA TŠOLO** contrary to the directive issued by the **1ST RESPONDENT (DIRECTOR OF PUBLIC PROSECUTIONS)** amounts to an undue interference of the powers vested in the **1ST RESPONDENT (DIRECTOR OF PUBLIC PROSECUTIONS)** and hence unconstitutional.
17. That it be declared that the selective prosecution of the **1ST and 2ND APPLICANT** to the exclusion of **LIKELELI TAMPANE, ‘MAFUSI MOSAMO and MOTENA TŠOLO** is discriminatory and hence unconstitutional and or unlawful”

[4] Prayer 7 was amended by consent and appears in the amended form. Prayers 1 and 2 in the interlocutory application are renumbered prayers 16 and 17 by

consent. The matter was argued holistically and these prayers pursued subject to interlocutory application being granted.

II. BACKGROUND

[5] On 2nd July 2019 the Director of Public Prosecutions, (“DPP”), issued a directive to the Directorate on Corruption & Economic Offences, (“DCEO”), to charge the applicants and Mmes. *Likeleli Tampane, Mafusi Mosamo* and *Motena Tsolo* under the PC&EO Act.

[6] The DCEO did not implement the directive. As a consequence, the Director General, (“DG”), of the DCEO and the DPP were summoned and appeared before the Public Accounts Committee (“PAC”) on 22nd and 29th October 2019, respectively, to account why the applicants were not charged¹. The suspicion was that, Mr. *Manyokole*, who became the DG after the directive was issued, was frustrating the efforts to have the suspects charged, thereby defeating the ends of justice².

¹ Pleadings, page 117 – Mochoboroane’s Answering Affidavit, para 18

² Pleadings, page 148 – Hansard

[7] On 4th November 2021 the applicants, to the exclusion of Mmes. *Likeleli Tampane, Mafusi Mosamo* and *Motena Tsolo*, were arraigned before the fourth respondent where they were charged. After the charges were read, Counsel for the applicants, Mr. *Lephuthing*, objected to them and moved the learned Magistrate to refer the matter to this Court for guidance in terms of section 128 of the Constitution.

[8] Mr. *Lephuthing*'s contention was that the applicants were charged pursuant to the Chairman of the PAC's recommendation after he interviewed the applicants, the officials of the DCEO and the DG. Therefore, Mr. *Lephuthing* argued, the Chairman of the PAC interfered and/or compromised the investigations. He asserted that the accused were ridiculed in the media as a result of privileged information between themselves and the DCEO being disclosed during the PAC's proceedings.

[9] Having heard and considered Mr. *Lephuthing* 's submissions, the learned Magistrate handed down his ruling as follows:

“After the charges were read and explained to the accused their counsel of record Adv. Lephuthing rose up and informed the court that he is objecting to the charges on behalf of the accused. In a nutshell his reasons are that the chair person (sic) of the Public Accounts Committee the Honourable Selibe Mochoboroane

had interfered with the investigations of this matter or compromised them. The basis for this is that the said Hon. Mochoboroane had interviewed the accused persons at the parliament together with the officials of the DCEO such as the Director – General or the suspended investigating officer. The DCEO does not object to this application. Section 128 (1) of the Constitution provides that: -

Where any questions as to the interpretation of this Constitution arises in any proceedings in any subordinate court or tribunal and the court or tribunal is of the opinion that the question involves a substantial question of law, the court or tribunal may, and shall, if any party to the proceedings so requests, refer the question to the High Court.

Clearly, the section talks about a question as to the interpretation of the constitution which arises in any proceedings in any subordinate court or a tribunal. In this matter before court there is not such a question as to the interpretation. The fact that the Hon. Mochoboroane had interviewed the accused or the investigating officers of this matter cannot be said is the question as to the interpretation of the constitution. If the accused did not want to be interviewed by the said Mochoboroane they could have approached the courts of law for legal remedy.

In the same vain, if they feel aggrieved by the acts of Mochoboroane the courts of law are there for them to seek redress. The interviews held by Mochoboroane were held in terms of his scope of his duties and there is nothing wrong to do so if he was executing his mandate. As such, the said interviews cannot be a ground for the court not to remand the accused. For these reasons the application is dismissed and the accused persons are remanded accordingly.”

-

[10] Save for queries relevant to discrimination and selective prosecution, which were introduced at a later stage, the application is grounded on the same set of facts that were advanced by Mr. *Lephuthing* before the learned Magistrate when he argued for a referral under section 128.

[11] Evidently, the applicants instituted this application because of their displeasure with the decision of the learned Magistrate and not because of decisions antecedent to the criminal proceedings. The net effect of the

application is to circumvent that decision. I, therefore, accept the submission of the respondents that instead of instituting collateral proceedings, the applicants should have either appealed the decision or come to this Court under section 128 (1) for an answer on the limited issue they desired be referred. They have not done so.

[12] The result is that there is finality on the decision of the learned Magistrate not to refer the so-called constitutional issue. For this reason, the applicants should have pleaded to the charges and the trial proceeded. They did not do that and are instead before us to collaterally attack the trial.

[13] I will deal with the collateral attack in due course after disposal of interlocutory application to amend the notice of motion to include prayers 16 and 17 and preliminary points raised by the respondents.

III. INTERLOCUTORY APPLICATION

[14] The interlocutory application has been instituted in terms of rules 11 and 24 of the **Constitutional Litigation Rules, Legal Notice No. 194 of 2000** read with rule 33 of the **High Court Rules, Legal Notice No.9 of 1980**.

[15] The principles applicable to this issue have been set out in numerous cases. It is trite that a court hearing an application for amendment has a discretion whether to grant the application or not. In **Caxton Ltd & others v Reeva Forman (Pty) Ltd & another**³ Corbett CJ, stated that the decision whether to grant or refuse an application to amend a pleading rests in the discretion of the court but that it must be exercised with due regard to certain basic principles. Generally, the very important consideration is that of prejudice. An amendment will not be granted if it will cause the other party such prejudice that it cannot be cured by an order for costs or a postponement.

[16] The following statement by *Watermeyer J*, in **Moolman v Estate Moolman & another**⁴ is instructive:

“The question of amendment of pleadings has been considered in a number of English cases. See for example: *Tildesley v Harper* (10 ChD 393); *Steward v North Met Tramways Co* (16 QBD 556) and the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would

³ 1990 (3) SA 547 (A) at 565G

⁴ 1927 CPD 27 at 29

cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading it is sought to amend was filed.”

[17] In **Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another**⁵ *Caney J*, said that the mere loss of the opportunity of gaining time is not in law prejudice or injustice and that ‘where there is a real doubt whether or not prejudice or injustice will be caused to the defendant if the amendment is allowed, it should be refused, but it should not be refused merely in order to punish the plaintiff for his neglect.’

[18] The learned Judge expressed the view that, there being no prejudice to the other party, the delay in bringing forward the amendment is not a ground for refusing it. These considerations were succinctly captured by my learned brother *Monaphathi J* in **Matsoso v. Lesotho Tourist Board**⁶.

[19] In **Mahlomola Khabo v. Lesotho Bank**⁷ *Maqutu AJ*, as he then was, quoted with approval *Wessles J* where he said the following in **Whittaker v. Roods** 1911 TPD 1092 at 1102:

⁵ 1967 (3) SA 632 (D) at 639 B

⁶ (CIV/APN/472/99) [2000] LSHC 79 (17 November 2000)

⁷ 1991 – 1996 (1) LLR 241 at 243

“This Court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts.”

I respectfully agree.

[20] With the above principles in mind, I now proceed to consider the facts in *casu*. The kernel of applicants’ case is that the answering affidavit of the DPP as well as the Hansard dispatched by the ninth respondent unraveled crucial evidence warranting amendment to the reliefs sought in the notice of motion. This is the fact that the DPP had issued a directive to the DCEO that *Mmes. Likeleli Tampane, Mafusi Mosamo and Motena Tsolo* be charged together with the applicants.

[21] The applicants contend that the DCEO and the DG initiated selective and discriminatory prosecution by charging them to the exclusion of their co-suspects named in the directive. They further argue that deviation from the directive amounted to undue interference with exclusive powers vested in the DPP, thus unconstitutional and/or illegal.

[22] The DPP has not filed an affidavit but has filed notice in terms of rule 30 of the **High Court Rules**. Significantly, at the commencement of argument, Mr. *Rafoneke* for the DPP indicated that her client was abandoning her opposition to prayers 7 and 9, as well as to prayers 16 and 17, subject to the application for amendment being granted.

[23] It remains unclear why the DPP is resisting the application for amendment to introduce prayers 16 and 17 in circumstances where she has abandoned her opposition to these prayers. Mr. *Rafoneke* confirmed that the prayers are in fact, aligned to the expectations of the DPP that Mmes. *Likeleli Tampane*, *Mafusi Mosamo* and *Motena Tsolo* should have been charged jointly with the applicants.

[24] Be that as it may, the DPP argues that though the application purports to be made in terms of rules 11 and 33 of the **Constitutional Court Litigation Rules** and the **High Court Rules**, respectively, it has not complied with these rules. Thus, continues the reasoning, the application is an irregular step. The second and third respondents share the same sentiments in their answering affidavit. They specifically assert that:

“1.2 Rule 11 of the Constitutional Litigation Rules provide that an application maybe made which seeks certain directives from the Court, while Rule 33 of the High Court Rules provides that a party who intends to have any pleading amended may serve a Notice of its intention to so amend and only apply to the court when an objection to the intended amendment is filed.”

[25] The respondents are correct that in terms of rule 33, application for leave to amend is only filed when there has been an objection to the notice of intention to amend. In *casu*, the applicants did not file notice of intention to amend first, they filed the application right away.

[26] However, invocation of rule 30 by the DPP to attack the application for amendment is legally flawed and devoid of merit. Rule 24 of the **Constitutional Litigation Rules**, read with the first schedule thereto, specifies which of the **High Court Rules** apply to proceedings before this Court. Evidently, rule 30 of the **High Court Rules** is not one of these rules as it is not listed in the first schedule. Consequently, rule 30 has no application to proceedings before this Court. Its invocation is therefore misplaced.

[27] Assuming for a moment in favour of the DPP that rule 30 of the **High Court Rules** has application in the instant proceedings, or that the applicants have taken an irregular step as asserted by the respondents, then the next enquiry

concerns the question of prejudice. However big irregular step may be, it is never the intention of rule 30 that it should be visited with extreme remedy of nullifying the pleading concerned even where there is no proven prejudice to the complainant⁸.

[28] Mr. *Rafoneke* conceded, correctly so in my view, that the irregularity complained of did not prejudice the DPP. The DPP was served with the application and therefore presented with an opportunity to deal with its merits. However, unlike the DCEO and the DG who pleaded over, the DPP confined herself to objection in terms of rule 30.

[29] Again, the word prejudice appears nowhere in the DG and DCEO's answering affidavits. It is trite and requires no authority that where a proven irregularity does not prejudice the complaining party, the court is entitled to overlook it. This is therefore a perfect case to ignore the irregularity complained of by the respondents.

[30] Moreover, the suggestion by the respondents that rule 11 of the **Constitutional Litigation Rules** is restricted to applications where applicant

⁸ *Gardiner v Survey Engineering (Pty) Ltd* 1993 (3) SA 549 (SE); *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik* 1991 (1) SA 823 (T).

seeks direction from the Court is untenable. Application of the rule extends beyond applications that are intended to seek direction from the Court. The rule reads as follows:

- “11. (1) Unless otherwise provided, in any matter in which an application is necessary *for any purpose, including* –
- (a) in respect of matters referred to under sections 22 and 69 of the Constitution; and;
 - (b) the obtaining of direction from the Court,
- the application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for the relief and shall –
- (i) state an address within 25 kilometres from the office of the Registrar at which the applicant will accept notice and service of all documents in the proceedings;
 - (ii) set forth a day, not less than five days or not more than 30 days after service of the application on the respondent, on or before which the respondent is required to notify the applicant in writing whether the respondent intends to oppose the application;
 - (iii) state that, if no such notification is given, the Registrar will be requested to place the matter before the Court to be dealt with under sub-rule (5).
- (2) The notice of motion shall be in such form as specified in Form 1 and Form 2 of the Second Schedule respectively.” (My emphasis)

[31] The word “including” in the opening line of rule 11(1) makes it clear that the application of the rule goes beyond applications that are brought in respect of matters referred to under sections 22 and 69 of the Constitution or for obtaining of direction from the Court. It applies whenever it is necessary to bring an application to Court for “any purpose”. In the absence of express enactment to the contrary, I find that the interlocutory application is accommodated by rule 11.

[32] It is further argued on behalf of the DPP that the notice of motion filed and served by the applicants amounts to irregular step as it has not been signed by the applicants or their appointed Attorneys contrary to rule 20(1) of the **High Court Rules**. The argument was not pursued during hearing – advisedly so in my view. The argument was factually wrong as the notice of motion filed of record is signed.

[33] According to the DCEO and the DG, the applicants saw the directive in issue on 11th December 2019 when they received the answering affidavit of the Chairman of the PAC. Consequently, so goes the argument, the applicants are misleading the Court when they create the impression that they only learned of the directive when they received the Hansard from the ninth respondent. No submissions were made in Court with respect to this argument.

[34] Suffice to say that, in my view, the argument was untenable. The parties are clearly at cross purposes on this aspect. The relevant part of applicants' affidavit that has attracted criticism from the DCEO and the DG advances the ground for the amendment and discloses the source of the ground. Conversely, the respondents are addressing a different matter – the stage at

which the applicants became aware of the ground for the amendment. The respondents are insinuating that the applicants delayed in bringing the application for amendment. It bears repeating that, in the absence of prejudice to the other party, the delay is not sufficient to dislodge application for amendment.

[35] At any rate, the suggestion by the respondents that the applicants learned of the directive on 11th December 2019 when they received the answering affidavit of the Chairman of the PAC is illogical. Similarly, the accusation that the applicants are misleading the Court in this regard is baseless.

[36] The argument overlooks the fact that the directive is also attached to the DPP's answering affidavit which was received by the applicants' lawyer on 5th December 2019. As a result, the applicants already knew of the directive when they were served with the Chairman of the PAC's answering affidavit.

[37] As regards the contention by the applicants that the respondents initiated selective prosecution, the DG argues that the respondents have not committed any alleged unconstitutional and /or illegal interference. He argues that –

“In terms of the 2nd Respondent’s governing legislation, the critical requirement is that the 2nd Respondent must get 1st Respondent’s consent prior to instituting criminal action against any accused person. It is quite obvious that the Savingram referred to above conveyed that consent long before the PAC Session. 1st and 2nd Respondents are both prosecuting authorities and it will be absurd if 1st Respondent can choose who to prosecute on the basis of evidence at hand and 2nd Respondent cannot do the same. It is unheard of that the 1st Respondent’s directive in terms of who to prosecute is binding on the 2nd or 3rd Respondent. This is not supported by any provision both in the Constitution and the 2nd Respondent’s governing legislation”.

[38] Finally, the DCEO and the DPP contend that prosecuting some and not all the suspects has no impact on the fairness or otherwise of the process.

[39] In my view, the last two contentions deal with the merits and will accordingly be addressed at the appropriate stage.

[40] In weighing the reasons or explanation given by the applicants for the amendment against the objections raised by the respondents, I find the grounds for opposing the application for amendment not well measured to repulse the proposed amendment. Admittedly, there might have been some delay in instituting the application for amendment – the applicants received the answering affidavit from the DPP’s office which has the directive on 5th December 2019, but the application for amendment was only filed on 18th February 2020.

[41] Be that as it may, jurisprudence tells us that, negligence or the delay is not sufficient ground for refusing application for amendment in the absence of prejudice to the other side. The respondents have not shown any prejudice that they will suffer should the amendment be granted. In fact, Mr. *Rafoneke* conceded that the DPP will not suffer any prejudice. In consequence, the application for amendment is granted.

IV. PRELIMINARY POINTS RAISED BY THE RESPONDENTS

[42] I now turn to the preliminary points advanced by the respondents. In so doing, I will not address the points in *limine* raised by the DPP. This will be otiose as the DPP has abandoned her opposition to substantive prayers which the applicants are pursuing. The enquiry in this regard will be restricted to preliminary points relevant to prayers that are being pursued.

[43] Besides attacking the application on the ground that invocation of section 22 of the Constitution was unjustifiable, the respondents raised the following preliminary points worthy of consideration: (a) lack of jurisdiction to review the proceedings of the PAC; and (b) lack of *locus standi* to pursue prayer 9.

I propose to deal with contentions regarding invocation of section 22 when I deal with the propriety of collateral attack.

Is the application directed at reviewing the proceedings of the PAC?

[44] The main contention of the PAC and its Chairman as I understood the argument, came to this: the application is directed at reviewing the proceedings of the PAC. As a consequence, so the argument proceeds, it has to be dismissed because this Court does not have jurisdiction to review the proceedings of the PAC in terms of section 119(1) of the Constitution. Admittedly, there is reference to *“the review of an unconstitutional and or prejudicial interference of the legislative branch of government over the prosecutorial powers of THE DIRECTOR OF PUBLIC PROSECUTIONS”* in the founding affidavit.

[45] However, it is not evident on the facts alleged or pleaded that the attack is directed at reviewing or setting aside the proceedings of the PAC. Neither is there a corresponding prayer for review of the proceedings of the PAC in the notice of motion. The respondents’ reliance on prayer 9 to buttress their

argument is devoid of merit. It seems to me obvious that what the applicants want in terms of prayer 9 is just a declaratory order. The applicants' attack is directed at the PAC's jurisdiction to entertain or interrogate issues relevant to the criminal investigations, which conduct the applicants complain it violated their right to a fair hearing.

Do the applicants have *locus standi* to pursue prayer 9?

[46] This must be said concerning the argument that the applicants do not have *locus standi* to pursue the declaratory order in terms of prayer 9. Facts relevant to prayer 9 are canvassed by the applicants from paragraphs 4.3 to 4.8 in the founding affidavit. The applicants contend that the DPP and the DCEO were called upon to account over issues related to their alleged involvement in criminal activities and to explain why the applicants may not be prosecuted. In the premises, so argue the applicants, the PAC did not only act beyond its mandate, but it interfered with the prosecutorial functions of the DPP as a result of which there is no guarantee that their criminal trial will be conducted freely and fairly.

[47] Inasmuch as the affidavit, as well as the prayer, may have not been elegantly drafted, the application is about enforcement of a right to fair hearing in the

criminal trial. The applicants clearly have a direct and peculiar interest in getting a fair hearing in their criminal trial. Therefore, Mr. *Moshoeshoe*'s reliance on **Mofomobe & Another v. Minister of Finance; Phoofolo KC & Another v. The Prime Minister & Others**⁹ is misplaced. There the applicants alleged violation of section 20(1) of the Constitution.

[48] Unlike in the instant matter, the applicants in that case had not demonstrated in what way the section had been violated in relation to them individually, not just as taxpayers and citizens of Lesotho as they contended. It follows that there is absolutely no merit in the respondents' argument that the applicants do not have *locus standi* as far as it relates to prayer 9.

V. COLLATERAL ATTACK OF CRIMINAL PROCEEDINGS

[49] I preface the discussions with policy considerations against collateral proceedings. The Supreme Court of Canada in **Garland v Consumers' Gas Co**¹⁰ stated that:

“the fundamental policy behind the rule against collateral attack is to ‘maintain the rule of law and to preserve the repute of the administration of justice’. (*R v Litchfielda* [1993] 4 SCR 333 at 349). The idea is that if

⁹ (C of A (CIV) 17/2017) [2017] LSCA 8

¹⁰ [2004] 1 SCR (200 SCC 25) para [72] (quoted in Herbstein and van Winsen *The Civil Practice of the High Courts of South Africa*(5ed) Vol 1 p 612).

a party could avoid the consequences of an order issued against it by going to another forum, this could undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.”

[50] In **Arthur JS Hall v Simons**¹¹ Lord *Hoffmann* said:

“The law discourages re-litigation of the same issues except by means of an appeal. The Latin maxims often quoted are *nemo debet bis vexari pro una et eadem causa* and *interest rei publicae ut fins sit litium*. They are usually mentioned in *tandem* but it is important to notice that the policies they state are not quite the same. The first is concerned with the interest of the defendant: a person should not be troubled twice for the same reason. This policy has generated the rules which prevent re-litigation when the parties are same: *autrefois acquit res judicata* and *issue estoppel*. The second policy is wider: it is concerned with the interests of the state. There is a general public interest in the same issue not being litigated over again. The second policy can be used to justify the extension of the rules of *issue estoppel* to cases in which the parties are not the same but the circumstances are such as to bring the case within the spirit of the rules.”

[51] In **Sole v. Penzhorn And Others**¹² *Steyn P* warned:

“It seemed clear to us that, quite of appellant's challenge set out in his notice to object to, except to and quash the indictment, was the court that was about to try him. With this proposition his counsel agreed. The reason why he launched his civil application, so he submitted, was because he was raising a constitutional issue. The issue was a constitutional one because appellant's right to a fair trial was in jeopardy.

I have difficulty in understanding why for this reason it was necessary to launch the civil application *in casu*. If an accused could delay the commencement of a criminal trial by launching civil proceedings alleging that his right to a fair trial in a pending criminal trial was jeopardised

¹¹ *Arthur JS Hall and Company v Simons and Barratt v Ansell and others v Scholfield Roberts and Hill* [2000] UKHL 38; [2000] 3 ALL ER 673; [2000] 3 WLR 543 (quoted in *Herbstein and van Winsen The Civil Practice of the High Courts of South Africa*(5ed) Vol 1 p 612 to 613).

¹² LAC (2000-2004) 203

because of facts alleged by him, criminal trials would suffer unwarranted disruption and delays. In this context it must be borne in mind that charges may be withdrawn or at the start of the criminal trial when the appellant is called upon to plead, other objections may be raised in terms of section 162 of the Act. To the extent that they are sustained it could result in the trial not proceeding. It would therefore be inappropriate to embark prematurely upon an enquiry in a civil suit.

The objection taken by appellant raises both factual and legal issues. (See in this regard *S. v. Mushimba en Andere* 1977 (2) SA 829(A); *Sanderson v. Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) and *Harksen v. Attorney-General, Cape and Others* 1999(1) SA 718(C) at 736-737). These issues are eminently suited for evaluation and determination in the criminal Court where appellant stands indicted. This was the Court in which such application was correctly launched by him. His claim for the relief sought by way of civil proceedings was clearly misconceived and was rightly dismissed.”

[52] *Gauntlett* JA repeated this proposition in **Jurgen Fath And Another v. Minister of Justice And Another**¹³, by saying:

“[37] In Lesotho, moreover, this court has disapproved of the general practice, in *Sole v Penzhorn and Others* LAC (2000-2004) 203 at 206H and again, emphatically, in *Sole v Cullinan NO and Others* LAC (2000-2004) 572.

[38] That is not to say that circumstances may not arise in which a challenge to the competence of a criminal court to hear a matter may permissibly be made outside the ambit of the Code. That resort must, however, be rigorously justified. As a minimum, the resort would have to be shown to be necessary, because the Code offers no appropriate mechanism for the challenge or because some other compelling consideration warrants it.

[39] Resort to the declaratory powers of the High Court at common law in inessential circumstances has, it may be noted, obvious complicating consequences. The court, ruling in indictments and jurisdiction in the context of the Code, does so within a particular framework for appeals (and appealability). Declarators on the other hand are discretionary. Different tests may arise for appealability. There is also the prospect of greater delay. Nothing prevented the appellants here from seeking the determination of the preliminary issues by the trial judge in the criminal

¹³ LAC (2005 – 2006) 436 at 451 to 452

matter at an initial hearing, before (as happened) a lengthy period was procured for the trial itself and ultimately wasted.”

[53] *Melunsky* JA reiterated the proposition in **Director of Public Prosecutions And Another v. Lesupi And Another**¹⁴:

“[18] A further obstacle facing the respondents and which is purely procedural concerns the institution of a collateral constitutional application during the course of trial. A resort to this procedural device has been strongly disapproved of in this court. See *Jürgen Fath and Another v Minister of Justice and Another* LAC (2005-2006) 436 and the authorities quoted therein at para [37]. At paragraph [38] in *Jürgen Fath’s* case, Gauntlett JA said the following:

‘That is not to say that circumstances may not arise in which a challenge to the competence of a criminal court to hear a matter may permissibly be made outside the ambit of the Code. That resort must however be rigorously justified. As a minimum the resort would have to be shown to be necessary, because the Code offers no appropriate mechanism for the challenge or because some other compelling consideration warrants it’.

In *Jürgen Fath’s* case the application was made before any evidence was led. This is an *a fortiori* [i.e. all the more so; even stronger] case: for here the court *a quo* had already heard a considerable amount of evidence and it was seized of the matter. Moreover all of the matters raised in the application could, and should, have been dealt with at an appropriate stage of the trial. There was no need for the respondents to have interrupted the smooth functioning of the ordinary criminal procedures by means of a collateral constitutional application. For this reason, too, the application cannot succeed.”

[54] In **Ntaote v. Director of Public Prosecutions**,¹⁵ the learned Judge of Appeal got an opportunity to repeat the message when he said:

¹⁴ LAC (2005-2008) 403

¹⁵ *Ntaote v. Director of Public Prosecutions* LAC (2007 - 2008) 414 at 418

“[9] There are other grounds why the application cannot succeed. The present application, pending a criminal prosecution, is not only to be discouraged. It is not to be resorted to unless exceptional circumstances are present. (See, in this regard, *Jürgen Fath and Another v The Minister of Justice and Another* LAC (2005-2006) 436 and the authorities quoted therein at para [37] and especially at para [38] and for the most recent decision, *The Director of Public Prosecutions and Another v Lesupi and Another* LAC (2007-2008) 403 at para [18]. All of the issues raised in the application are matters which, if at all relevant, should be dealt with in the criminal litigation. No exceptional factors or circumstances warrant the court’s consideration of these issues at a preliminary hearing. On the contrary it would be far more appropriate for them to be dealt with at the trial, if the court considers them to be pertinent and germane to the issues before it. For this reason the application was fatally flawed and the question of the disputed factual matters does not even arise.

[10] Moreover, and in the circumstances of this case, it is untenable that the court should now investigate the appellant’s claim that he will allegedly suffer prejudice should the hearing proceed and should Ms Peko give evidence as a prosecution witness. In *Key v Attorney-general, Cape Provincial Division and Another* 1996 (4) SA 187 (CC) at 195-6, para [13] *Kriegler J* enunciated that while an accused person must be given a fair trial, fairness is an issue which has to be decided upon the facts of each case. It follows, of course, that prejudice that an accused might suffer should generally be decided upon the facts at the trial. Such prejudice must be trial-related and not fanciful or speculative (see *S v The Attorney-General of the Western Cape; S v The Regional Magistrate, Wynberg and Another* 1999 (2) SACR 13 (C) at 25-26). Although there are cases in which the prejudice might be unrelated to the trial (see *Director of Public Prosecutions and Another v Lebona* (1995-1999) LAC 474 at 497G-498C), this is not one of them. The claim of prejudice relied upon by the appellant is purely conjectural and may not arise at all. In the main, it is based on the legal principle, which is in dispute in the application, that the communications allegedly made to Ms. *Peko* by the appellant and his counsel are privileged. But Ms *Peko* denied that any such information was ever communicated to her. The notional existence of possible prejudice to an accused does not entitle him to institute a preliminary application of the kind now before us.”

[55] *Gauntlett JA* had cautioned as follows in **Sole v. Cullinan NO and Others**¹⁶

regarding invocation of section 22:

¹⁶ LAC (2000-2004) 572 at 594

“[38] The Constitution of Lesotho, it will however have been noted, specifically authorizes the use of the particular constitutional remedy which s 22 provides. Notwithstanding this, the provision to s 22(2) expressly accords the High Court the discretion to decline to exercise its powers in this regard if satisfied that “adequate means of redress for the contravention alleged” are available. In my view, they undoubtedly were so available in the present case. A failure by an inferior court to recuse itself when required by law to do so amounts to a gross irregularity, which can always be ventilated on appeal. *State v Moodie* 1962 (1) SA 587 (A). In these circumstances, and given the inherent undesirability involved in the duplication of proceedings, the incurrence of unnecessary costs (both for litigants and the State) and the use of scarce judicial resources, it is not all clear why the court *a quo* in this matter did not at least consider the exercise of its power in terms of s 22(2). *It is important that in future invocation of s 22, the High Court should give careful consideration to its powers under that provision.*” (My emphasis).

[56] The above *dictum* is now part of our jurisprudence and is continuously observed. *See: Ntsihlele Matsoso and 127 Others v. Independent Electoral Commission and Others*¹⁷; *Lebohang Mei v Mr. Justice Thamsanqa Nomngongo and 4 Others*¹⁸.

[57] I cannot emphasise it enough that based on section 22(2) of the Constitution, fortified by a very rich jurisprudence, this Court may decline to hear a constitutional matter if it is satisfied that the applicant has adequate means of redress for the contravention alleged.

[58] To buttress the point that constitutional claims should not supplant or circumvent claim for relief according to ordinary general law, the Privy

¹⁷ [2019] LCSA 53 (01 November 2019)

¹⁸ (CC 06/18) [2021] LSHC 107

Council in **Duncan and Jokhan (Appellants) v. Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago)**¹⁹ referred to the following statement by Lord Nicholls in *Trinidad and Tobago v Ramanoop*²⁰:

“25. In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absences of such a feature would be a misuse, or abuse, of the court’s process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.

26. That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But ‘bona fide resort to rights under the Constitution ought not to be discouraged’: Lord Steyn in *Ahnee v Director of Public Prosecutions* [1999] 2 AC294, 307, and see Lord Cooke of Thondon in *Observer Publications Ltd v Matthew* (2001) 58 WIR 188, 206.”

[59] The lessons learned from the above *dicta* is that collateral attacks of criminal proceedings by way of resort to this Court’s section 22 jurisdiction must be rigorously justified by reference to exceptional factors or circumstances.

The jurisdiction is not there to be used as an opt out to remedies provided in

¹⁹ [2021] UKPC 17

²⁰ [2005] UKPC 15; [2006] 1 AC 328

the **Criminal Procedure and Evidence Act, No. 7 of 1981** (“*CP&E Act*”).

A resort to section 22 in the face of available parallel remedies constitutes an abuse of the court’s process²¹. The test is whether the criminal process provides adequate means of redress and not whether the section 22 jurisdiction is best suited to address the legal issues.²²

[60] The Constitution enjoins the subordinate courts to hear cases in a fair manner. They are obliged to uphold and protect the rights of accused persons to a fair trial as guaranteed in section 12 of the Constitution²³. These courts have judicial power to act whenever an accused person complains about a demonstrable infringement of an aspect of his rights to a fair trial. Thus, once a constitutional issue is raised, the trial court must enquire into the matter to the extent necessary to determine whether the accused has suffered irreparable trial related prejudice or a resultant miscarriage of justice²⁴. This should be so because the central objective to bring about a substantive fairness in a trial is a matter for the decision of the trial court to be answered on the available evidence.

²¹ *Duncan and Joka v. Attorney General of Trinidad and Tobago* [2021] UKPC 17 (12 July 2021)

²² *Brandt (Appellant) v. Commissioner of Police and Others* [2021] UKPC 12 (10 May 2021)

²³ *Molemohi v. His Worship Senior Resident Magistrate Thamae and others* [2021] LSHC 135 (30 November 2021)

²⁴ *Ketisi v. Director of Public Prosecutions* LAC (2005 – 2006) 503 at 510 D - G

[61] Section 22 of the Constitution assigns to this Court the role of a sentinel on the *qui vive*. But this role does not displace the duty of criminal courts to protect and enforce the section 12 fair trial rights. The section 22 jurisdiction is also not intended to displace the accused's duty to follow procedures to obtain remedies provided by the CP&E Act or to invoke other remedies in the Constitution such as a review and appeal in terms of sections 119 and 130 respectively.

[62] It is the coherence of the interpretation of these sections of the Constitution read with the CP&E that one gets a deeper and better understanding of the utility of section 22 in the broader constitutional scheme of things. Resort to section 22 constitutional remedies must be the last choice and not first choice where other laws provide alternative adequate remedies. This rhymes and reasons with the constitutional principle "that a court will not determine a case on a constitutional basis if it is properly capable of being appropriately adjudicated on another basis."²⁵

[63] The rationale for this approach is articulated by the Privy Council thus:

"35... This approach prevents unacceptable interruptions in the normal court process, avoids encouraging technical points which have the tendency to divert attention from the real or central issues, and prevents the waste and dissipation of public funds in the pursuit of issues which may well turn out to be of little importance or no practical relevance in a case when properly viewed at the end of the process. This approach also promotes the rule of law and the finality of

²⁵ *Sekoati And Others v. President of the Court-Martial And Others* LAC (1995-99) 812 @ 820 E-F

litigation by preventing a claim or constitutional relief from being used to mount a collateral attack on, for example, a judge's exercise of discretion or a criminal conviction, in order to bypass restrictions in the appellate process..."²⁶

[64] Allowing a party to re-litigate the same issues in different courts, otherwise than by appeal or review, is to subvert the maintenance of the rule of law and undermine the integrity of the justice system. It is not permissible for a party who gets unfavourable judgement in one court to re-litigate the same point and improve it by addition of other points which were not raised in the first instance as it has been done here.

Is there justification for collateral proceedings *in casu*?

[65] Mr. *Rasekoai* made a vain attempt to justify collateral proceedings. He argued that the scope of the reliefs sought does not fall within the purview of defenses available under the auspices of section 162 of CP&E Act. This was not canvassed in the papers. Not a word is said on whether or not the remedies of objecting to the charges or quashing them are not adequate.

[66] In terms of section 162 (1), if “the accused does not object that he has not been duly served with a copy of the charge, or apply to have it quashed

²⁶ Footnote 22

under section 159 he shall either plead to the charge or except to it on the ground that it does not disclose any offence cognizable by the court.” The list of available pleas appears in sub-sections (2) – (5) as follows:

- “(2) If he pleads to the charge he may plead –
 - (a) that he is guilty of the offence charged or, with the concurrence of the prosecutor, of any other offence of which he might be convicted on the charge; or
 - (b) that he is not guilty; or
 - (c) that he has already been convicted or acquitted of the offence with which he is charged; or
 - (d) that he has received the Royal pardon for the offence charged; or
 - (e) that the court has no jurisdiction to try him for the offence; or
 - (f) that the prosecutor has no title to prosecute.
- (3) Two or more pleas may be pleaded together except that the plea of guilty shall not be pleaded with any other plea to the same charge.
- (4) The accused may plead and except together.
- (5) Any person who has once been called upon to plead to any charge, save as is specially provided in this Act or in any other law, shall be entitled to demand that he be either acquitted or found guilty”.

[67] I agree with Mr. *Rasekoai* that applicants’ case does not fall within the ambit of section 162 of the CP&E Act and that it is distinguishable from **Jurgen Faith and Another v Minister of Justice and Another**²⁷. However, Mr, *Rasekoai* cannot be heard to say that a challenge to the legitimacy of

²⁷ Footnote 13

criminal proceedings does not fall within the ambit of section 162 when the applicants never resorted to section 159 of CP&E Act.

[68] This Court has not been furnished with exceptional circumstances justifying institution of collateral proceedings. The applicants do not explain why it was necessary to sidestep the decision of the learned Magistrate by instituting collateral proceedings instead of applying to this Court under section 128 to have the issue raised in referral application answered.

[69] Again, the applicants could have raised whatever preliminary issues they had concerning violation of their constitutional rights or sought referral under section 22(3) of the Constitution instead of launching collateral proceedings. There are binding precedents on most of the issues raised by the applicants. As a result, these issues ought to have been raised directly with the learned Magistrate for determination, and a referral be sought under section 128 if need be.

[70] In my respectful view, the conclusion I reach is that there are no exceptional circumstances justifying collateral proceedings or invocation of section 22 (1) of the Constitution. It follows that there are no jurisdictional facts for this

Court to entertain this application. But since the parties argued the matter holistically, I nevertheless proceed to deal with the merits.

VI. THE MERITS

Issues

[71] In light of the fact that the applicant is pursuing only four prayers, the following four issues flowing from these prayers need to be interrogated *seriatim*:

71.1 whether the summoning and the alleged presentation before the PAC of evidence involving the applicants by the DDP violated section 12 read with section 99(6) of the Constitution.

71.2 whether the PAC has no jurisdiction to interrogate and or probe issues that have to do with criminal investigations conducted by the DCEO or to interfere with the prosecutorial powers of the DPP.

71.3 whether the decision of the DCEO and or the DG of charging the applicants to the exclusion of Mmes. *Likeleli Tampane, Mafusi Mosamo* and *Motena Tsolo* contrary to the directive of the DPP amounts to undue interference with the powers vested in the DPP, hence unconstitutional.

71.4 whether the prosecution of the applicants to the exclusion of Mmes. *Likeleli Tampane, Mafusi Mosamo and Motena Tsolo*, is discriminatory and hence unconstitutional and or unlawful.

[72] A good starting point is therefore to consider the powers and the mandate of the DPP, DCEO and the PAC. These institutions belong to two organs of State. I therefore pause a little to deal with the subject of separation of powers and its significance for these institutions.

[73] Lesotho reverted to constitutional democracy in 1993. As a result, all the institutions must bow to the Constitution and have their actions conform thereto. The 1993 Constitution embodies provisions that safeguard separation of power between the executive, legislature and judiciary. This ensures accountability through defined checks and balances for proper functioning of the State. These organs enjoy operational autonomy and are required to act within their sphere and not encroach on each other 's constitutional mandate. Doing otherwise will render these organs ineffective with ghastly consequences to the culture of the rule of law and democracy.

[74] In **Kalpana Mehta and Others v. Union of India and Others**²⁸, *Dipak Misra* CJI said the following at paragraph 25 on the subject of separation of powers:

“...The functioning of democracy depends upon the strength and independence of each of its organs. The Legislature and the Executive, the two facets of people's will, have all the powers including that of finance. The judiciary has no power over the sword or the purse. Nonetheless, it has power to ensure that the aforesaid two main organs of the State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and the executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. The exercise of powers by the legislature and executive is subject to judicial restraint and the only check on the exercise of power by the judiciary is the self imposed discipline of judicial restraint”.

The Public Accounts Committee (PAC)

[75] The Parliament of Lesotho, the National Assembly in particular, functions through various committees. These committees are established by Standing Orders and do groundwork for the National Assembly. The origin of Standing Orders can be traced from Section 81(1) of the Constitution. The section makes provision for each House of Parliament (Senate and the National Assembly) to regulate its own procedures and to make rules for orderly conduct of its own proceedings.

²⁸ (2018) 7 SCC 1

[76] Again, section 81(3) permits Parliament to make provision for the powers, privileges and immunities for its Houses and the Committees and the members thereof for purposes of the orderly and effective discharge of the business of its two Houses. Accordingly, the source of **Parliamentary Powers and Privileges Act No. 8 of 1994**, (*PPP Act*), is section 81(3) of the Constitution.

[77] It is common cause that the PAC was established in terms of **Standing Order 97(5)**. In terms of the Standing Order the PAC's mandate is to –

“consider the financial statements and accounts of all government ministries and departments, executive organs of state, courts, authorities and commissions established by the Constitution and each of the two Houses of Parliament; consider any audit reports issued on the financial statements, accounts or reports referred to the Committee by the House, the Speaker, or these Standing Orders”.

The PAC may also report on any financial statements, accounts, or reports considered by it to the National Assembly. It “*may initiate any investigation in its area of competence*”. (My emphasis)

[78] The authority of Parliament to summon people to appear before it and its committees comes from PPP Act. Section 9(1) reads thus:

“The Senate, the Assembly or a committee may, subject to sections 13 and 14, order a person to attend before them to give evidence under oath or affirmation or to produce a paper, book, record or document in the possession or under the control of that person.”

[79] Section 13, which is relevant to our discussion, provides that:

“Privileges or (sic) witnesses

13. (1) A person summoned to attend to give evidence or to produce any paper, book, record or document before the Senate, the Assembly or a committee is entitled to the same rights or privileges as before a court of law.
- (2) No person in the employment of the Government or parastatal shall refuse –
 - (a) to produce before the Senate, the Assembly or a committee any paper, book, record or document; or
 - (b) to give evidence before the Senate, the Assembly or a committee, relating to the work of any Government Department or parastatal unless, a Minister directs that it would be contrary to the public interest to do so.
- (3) Secondary evidence may not be received by or produced before, the Senate, the Assembly or committee of the contents of any paper, book, record or document which a Minister has directed shall not be produced.
- (4) An answer by a person to a question put by the Senate, the Assembly or a committee shall not be admissible in evidence against that person in any civil or criminal proceedings except in the case of criminal proceedings for –
 - (a) an offence against this Act; or
 - (b) perjury; or
 - (c) subornation of perjury; or
 - (d) defeating or obstructing the course of justice.”

[80] The section clothes the PAC with broad powers to summon persons in the employ of Government to give evidence. However, the breadth and reach of these powers are not unlimited. It is worth reiterating that these powers dare not be used to trench upon matters falling outside the oversight functions of Parliament. They may also not be exercised to influence decisions or to defeat or materially impair the discharge of constitutional and statutory functions of other branches of Government.²⁹

Director of Public Prosecutions

[81] The establishment of the office of the DPP is provided for in the Constitution. Section 99 which is relevant for our discussions provides that:

"Director of Public Prosecutions

99. (1) There shall be a Director of Public Prosecutions whose office shall be an office in the public service.

(2) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do —

- (a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;
- (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and
- (c) to discontinue at any stage before judgement is delivered any

²⁹ Ajat Mohan & Ors v. Legislative Assembly National Capital Territory of Delhi & Ors LL 2021 SCC 288 paras 103-105

such criminal proceedings instituted or undertaken by himself or any other person or authority.

(3) *The power of the Director of Public Prosecutions under subsection (2) may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions.*

(4) *The powers conferred on the Director of Public Prosecutions by subsections (2)(b) and (c) shall be vested in him to the exclusion of any other person or authority except the Attorney-General:*

Provided.....

(5)

(6) *Save as provided in section 98(2)(b) of this Constitution, in the exercise of the functions conferred on his by subsection (2) of this section or section 77 of this Constitution the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority. (My emphasis)*

[82] The provisions of section 5 (a) – (c) of CP&E Act mirror section 99 (2) (a) – (c) of the Constitution. Section 6(3) of the CP&E Act as amended by section 2 of the CP&E (Amendment) (No. 2) Act 1984 is aligned to the provisions of section 99(6) and 98(2)(b) of the Constitution. Section 6(3) as amended provides that:

"(3) In the exercise of the powers vested in him by section 5, the Director of Public Prosecutions shall be subject to the direction and control of the Attorney-General.

Provided that:

- (a) where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with leave of the court; and
- (b) nothing in this subsection precludes a court from exercising jurisdiction in relation to any question whether the Director of Public Prosecutions has exercised his functions under this subsection in accordance with law.”

[83] It is clear from the scheme of the Constitution as well as the CP&E Act that the DPP enjoys operational autonomy. It is only the Attorney General who, in terms of section 98(2)(b) of the Constitution, exercises ultimate authority over the DPP. Otherwise the DPP is not subject to the direction or control of any person or authority in discharge of her duties under section 99(2) or 77 of the Constitution.

[84] The DPP is manifestly insulated from interference. As said by My learned brother, *Sakoane* CJ in **Mothejoa Metsing and One v. The Attorney General and others**³⁰:

“[39] The Constitution wants a Director of Public Prosecutions who is independent and takes decisions to institute criminal prosecutions honestly, fairly and without fear, favour or prejudice. Independence requires there be no improper influence, hindrance or obstruction by organs of the State, the media or public opinion. The Director must avoid being subservient to Government and being influenced by powerful interests in society. She should not be prepared to be pushed around by politicians and the police. Hence, asserting her independence from political influences is a critically important requirement in maintaining public confidence in the fair and impartial administration of criminal justice.”

³⁰ (No.2) [2021] LSHC 123 Civ (18 November 2021) at para 39

Directorate on Corruption and Economic Offences (DCEO)

[85] In an effort to fight the scourge of corruption, nations established specialised investigations institutions. These institutions were originally dedicated to a fight against corruption, but their mandate is slowly being expanded to counter money laundering and financing of terrorism. Likewise, Lesotho enacted PC&EO Act which made provision for the establishment of the DCEO.

[86] The following provisions of the PC&EO Act as amended deserve attention in dealing with the powers and the functions of the DCEO:

“Establishment of Directorate

3. (1) There shall continue in existence the Directorate on Corruption and Economic Offences which –
 - (a) shall be a juristic person, having perpetual succession, capable of suing and being sued in its own name and of performing acts as are necessary for, or incidental to, the execution of its functions; and
 - (b) *shall not be subject to the direction or control of any person or authority in the exercise of its functions except in accordance with this Act. (My emphasis).*

“PART III Functions of Directorate

- 6 (1) The functions of the Directorate shall be –

- (a) to receive and investigate any complaints alleging corruption in any public or private body;
 - (b) to investigate any alleged or suspected offences under this Act, or any other offence disclosed during such an investigation;
 - (c) to investigate any alleged or suspected contravention of any of the provisions of the fiscal and revenue law laws of Lesotho;
 - (d) to investigate any conduct of any person, which in the opinion of the Director, may be connected with or conducive to corruption;
 - (e) *to prosecute, subject to section 43, any offence committed under this Act;*
 - (f) to assist any law enforcement agency of the Government in the investigation of offences involving dishonesty or cheating of the public or private revenue;
 - (g) procedures which in the opinion of the Director, may be conducive to corrupt practices;
 - (h) to instruct, advise and assist any person, on the latter's request, on ways in which corrupt practices may be eliminated by such person;
 - (i) to advise heads of public bodies of change in practices or procedures compatible with the effective discharge of the duties of such public bodies which the Director thinks necessary to reduce the likelihood of the occurrence of corrupt practices;
 - (j) to educate the public against the evils of corruption;
 - (k) to enlist and foster public support in combatting corruption; and
 - (l) to undertake any other measures for the prevention of corruption and economic offences.
- (2) *In the performance of its operational or investigative functions, the Directorate shall not be subject to the direction or control of any person except in accordance with this Act. (My emphasis)*

Prosecution of offences

43. (1) If, after investigation of any person under this Act, it appears to the Director General that an offence under Part IV or V has been committed by that

person, the Director General shall refer the matter to the Director of Public Prosecutions for his decision.

- (2) *No prosecution for an offence under Part IV or V shall be instituted except by or with the written consent of the Director of Public Prosecutions.”*
(My emphasis)

Annual Report

52. The Director-General shall, on or before 21 March in each year or by a later date as the Attorney-General may allow, submit to the Minister a report on the activities of the Directorate in the previous year for tabling before Parliament.”.

[87] It is vivid from the quoted sections of PC&EO Act as amended that the DCEO enjoys operational autonomy in discharge of its mandate. The only exception relates to prosecution of offences under Part IV or V where the DCEO is required to seek written consent from the DPP prior to commencing prosecution. Again, the DCEO reports to parliament through its portfolio Minister on an annual basis. It does not only report on strategic initiatives, but even on its activities.

Was the summoning of the DPP by the PAC a violation of the Constitution?

[88] The applicants complain that the summoning and the alleged presentation of evidence involving them by the DPP before the PAC is a violation of section 12 read together with section 99(6) of the Constitution. It is common cause

that the DG and the DPP were summoned before the PAC. They were summoned to account on execution of their duties to prosecute criminal cases³¹. The Chair of the PAC asserts that the “DPP has to account to the National Assembly like any other government ministry or department about the execution of the mandate of her office”.³²

[89] The discourse will be incomplete without referring to the extract below from the Hansard.

“HON. CHAIRPERSON: Gentlemen, I wish to relieve Madam DPP together with her team. It is very difficult to impress me but here where I am sitting, I am impressed. I am aware that you can work well if you like. You are aware that there are gaps. If you haven’t tested the law in the case where one does not comply with the resolution given by the office of the DPP, I permit you to go use the power vested upon you and not wait for the law to be amended. Violation of the law is violation of the law, no one can come here and argue that your judgement of 30 days is enough for it to be said a reasonable time.

Let’s instill respect towards the Police and DCEO and other stakeholders that once a directive has been issued, you have to comply with that directive, like it or not. Even you have to assist us that where you have issued a directive, it shouldn’t just be issued without necessary follow up to see to it that it is implemented. There is no one to come lie to us here going forward saying that the DPP has said a case is going under review, you have already told us that when you have issued a directive you are expecting compliance.

³¹ Pleadings, page 117 - Mochoboroane’s Answering Affidavit, para 18.

³² Ibid, page 114, para 12.3

They were lying to us not knowing that we will summon you. N. Kaya.

HON. KAYA Honourable Chairperson, I am still on the similar point that you have touched. I think what can only take place now is for DPP to assist us quickly with the amendment of the law that specifically indicate what is supposed to happen. Here it is just a common understanding as to what can be done at this moment. But it's clear that the law gives you the jurisdiction to give directive and if it is not complied then what happens next. We should fix it as of now to establish the scope of their function. This issue should be followed up and be brought to parliament for it to be ratified into a law.

HON. CHAIRPERSON Thank you Sir. Chief Whip.

HON. L. MAHASE: Madam DPP and her team should understand that this committee does not say one is guilty, what we are saying is that, one should go to court and be determined to be guilty or not by the court not this committee. We are only saying the wheel of justice to take its course so that it doesn't drag for a long time till some of the witness happen to die as a result cause such cases to pend yet someone is still not happy on the other side. This is why the perpetuation of more criminal activities take place which we have no control over. Please ensure that you truly do all in your power like our leader.

HON. CHAIRPERSON: Hon. T. S. Rapapa

HON. T. S. RAPAPA: Honourable Chairperson, I just want to read a small clause that govern us because I know there is already speculation that we as Public Accounts Committee we like intruding in things that do not have the jurisdiction to handle especially now that we have in our midst such an esteemed people. I

am reading the standing order No.97 (5) where it talks about Public Accounts Committee. But at the end where I really want to head to is the one in the middle which says:

“The Public Accounts Committee may report on any of the financial statement accounts, accounts or reports considered by it to this House; or initiate any investigation in its area of competence”

I take today’s matter as part of the issues to be investigated in particular. I would like to appeal to the Basotho nation and you respectable officers and you Honourable members that PAC is seen intruding itself on matters that it has no mandate to look into yet it has interest on only those that have financial gain on it. We are authorized by law to initiate any investigation on our own as members of this committee. That is what I needed to highlight. The last one on the first line says;

“The committee shall consider the financial statements and accounts of all government ministries and departments, execute organs of state, the courts, the authorities and commissions established by the constitution and of each one of the one of the two Houses of Parliament”. Thank you Mr Chairperson

HON. CHAIRPERSON:

I appreciate a lot Sir when you still keep passing that message till it sinks deep in people’s minds. The only person whom we cannot summon for questioning is the office of His Majesty. All these other ones including the Prime Ministers can be summoned to come answer questions. However, there are no hard feelings, I am releasing you but before I do, is there anything you wanted to say? “

[90] Clearly, the PAC is of the view that it can summon anybody to appear before it besides the office of the King. It was pursuant to this view that the PAC summoned the DPP and the DG to account why the applicants had not been charged. Certainly, the DPP and the DG were summoned to account on execution of their statutory mandate. The Chair of the PAC went to the extent of saying he was permitting the DPP “to go use the powers vested upon” her. The PAC manifestly misapprehended its powers over the DPP.

[91] While we have to borrow with caution, it is worthwhile to consider how other jurisdictions have approached the question of parliamentary powers and privileges. In **De Lille v. Speaker of the National Assembly**³³ Hlophe J, as he then was, said the following in buttressing the point that Parliament was subject to the constitution in respect of all its actions:

“National Assembly is subject to the supremacy of the Constitution. It is an organ of State and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution. It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication.”

³³ 1998 (3) SA 430 at 449

[92] In **Warkins v. United States**³⁴ the Supreme Court said the following in a case where a petitioner had refused to answer certain questions during the inquiry by a parliamentary subcommittee:

“We start with several basic premises on which there is general agreement. The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste. But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. This was freely conceded by the Solicitor General in his argument of this case. *Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.* Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible.” (My emphasis)

[93] This Court sitting in its ordinary jurisdiction made the following pronouncement in **Likeleli Tampane v. Speaker of the National Assembly & Others**³⁵ regarding the question whether the actions of parliament can be challenged before courts of law:

“[30] The 4th Respondent seems to be labouring under the impression that Parliament is sovereign and supreme such that its actions cannot be challenged in the court. This is a destructive misconception with a

³⁴ 354 US 178 (1957) at 187

³⁵ (CIV/APN/184/18) [2018] LSHC 20 (06 September 2018)

propensity to create a precedent to be regretted for generations and generations by even those who may now find it convenient or expeditious. It must be cautioned that under a constitutional democracy the Constitution is the one which is supreme and that the Judiciary is constitutionally mandated to censure the Executive against abuse of its power and authority ultra vires the Constitution. The same applies to the Parliament in that the Judiciary is constitutionally enjoined to ascertain that it enacts laws which are within the parameters of the Constitution to ascertain compliance with the letter, spirit and its implications. These would subsequently influence the interpretative direction and development of the enactment by the courts.”

[94] In **Moruri**³⁶ the Appeal Court emphasized that “Parliament and its committees are not above the Constitution and the law. They should stay within the scope of their legal mandate”.

[95] In a constitutional democracy, Parliament and its committees are required to conform to the Constitution. Otherwise they risk courts intervening if they act inconsistently with the Constitution and the law. Taking into account the mandate of the PAC and the effect of prosecutorial independence, in my view, the PAC does not have oversight jurisdiction on the performance or non-performance of investigative and prosecutorial functions by the DG and the DPP. If there is no competence of parliamentary oversight, it follows that the issuing of summons against the DPP and the DCEO officials,

³⁶ The Speaker of the National Assembly and Others v. Hlahlobo Moruri and Others (C of A (CIV) 40/2018) [2020] LSCA 11, page 10 para 10.

including its DG, was without jurisdiction and, therefore, void *ab initio* (from the beginning).³⁷

[96] There is no denying that the PAC has the power to initiate investigations, but these investigations must be in its area of competence. The PAC's area of competence or responsibility in terms of the **Standing Order** is the consideration of financial statements and audit reports of the Government. Consequently, whenever the PAC conducts investigations, it must be with this mandate in mind.

[97] The respondents have not issuably dealt with the applicants' assertion that none of the issues raised in DPP's interview had to do with the circumscribed scope of the PAC³⁸. The response that permeates the answering affidavits is that the DPP and DG were summoned to account over issues relating to their mandate. This reasoning shows no regard to presecutorial independence of the DPP and the DG.

[98] Criminal investigations or prosecution are outside the area of responsibility or competence of the PAC. Neither is there any provision in terms of which

³⁷ Ajat Mohan Op.cit. paras 106-107

³⁸ Pleadings, page 12 – Tlokotsi's Founding Affidavit, para 4.6

the DPP or the DG are obliged to account to the PAC regarding their mandate. The DCEO accounts to Parliament for its activities annually through its portfolio Minister.

[99] Section 9(1) of the PPP Act does not explain the purpose for which people can be summoned to appear before the PAC. However, it is well - established canon of statutory construction that “every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the legislature.”³⁹ In addition, legislative provisions ought to be interpreted to preserve their constitutional validity – interpretation that is constitutionally compliant must be preferred over an interpretation that is not⁴⁰.

[100] Invocation of section 9(1) must be in pursuit of the mandate of Parliament, as well to achieve the purpose of the PPP Act. The constitutional mandate of Parliament in terms of section 70(1) of the Constitution is to enact laws. It also considers audit reports that are laid before it in terms of section 117(4)

³⁹ Chotabhai v Union Government (Minister of Justice) 1911 AD 13 at 14; Independent Institute of Education (Pty) Limited v Kwazulu – Natal Law Society & Others 2019 (4) SA 200 (KZP) para 38

⁴⁰ Independent Institute of Education (Pty) Limited, supra, para 45; Saidi v Minister of Home Affairs 2018 (4) SA 333 (CC), para 62

of the Constitution. The PAC does groundwork for Parliament in respect of the latter function. The purpose of PPP Act as gathered from section 81(3) of the Constitution is to provide for the powers, privileges and immunities of the members of Parliament and its committees to ensure order and effective business of Parliament.

[101] We are told in **Howard Jarvis Taxpayers Association v. Padilla**⁴¹ that legislature needs sound judgement in enacting well informed laws as a result of which it has to undertake investigations aimed at aiding legislative function. However, legislature may not use its powers to defeat or materially impair the exercise of its fellow branches' constitutional functions, nor intrude upon a core zone of another branch's authority. Consequently, investigative powers may not be used to trench upon matters falling outside the legislative purview.

[102] Taking into account the purpose of the PPP Act, as well as the scope of the Parliamentary Standing Order relevant to PAC, and the need to preserve constitutional validity of section 9(1) of the Act, my view is that people can only be summoned to appear before Parliament and its committees, including the PAC, to give evidence on matters relevant to its mandate, not on anything that does not fall within its competence.

⁴¹ Cal.4th 486 (Cal.2016) at page 499

[103] Interpreting section 9(1) to mean that Parliament or its Committees can summon anyone about anything will be tantamount to giving it a blank cheque. It will definitely intrude upon a core zone of other branches of government. For instance, it would mean that simply because the applicants' criminal trial is related to public procurement, the PAC can summon the learned Magistrate and ask him to account on his handling of the case. This will be a direct assault to judicial independence, thus a patent violation of the Constitution.

[104] Accordingly, in making enquiries about procurement of government fleet, the PAC acted within its area of competence, especially if it was in the context of considering audit reports. However, the minute it sought accountability from the DPP and the DG on their handling of a criminal case relevant to the procurement, the PAC overstepped its mandate. It requires to be stressed that the DPP is not subject to anyone or any authority in discharge of her mandate. She does not answer to Parliament nor to the PAC.

[105] The only institution that exercises ultimate control over the DPP is the Attorney General. Where there are performance issues relevant to the office of the DPP, the buck stops at the Attorney General's door. He is the one who must account. Effective prosecution of crime is imperative constitutional mandate of the DPP. Consequently, insulating the DPP from political interference ensures that she undertakes her mandate independently without fear or favour. I reiterate that the summoning of the DPP was void *ab initio*, particularly when she was called to account on issues relating to her constitutional mandate as it fully appears under section 99(2) of the Constitution.

[106] The invalidity of summons is, however, not dispositive of prayer 7 in terms which the applicants seek a declarator. It is trite and requires no authority that a declarator is a discretionary remedy. Firstly, when the DPP was summonsed to appear before the PAC, she had already issued her written consent to the DCEO pursuant to section 43(2) of the PC&EO Act that the applicants be charged. The PAC did not direct her to do anything in relation the applicants' case.

[107] Though mischaracterized as a directive, what the DPP issued, is in fact, a written consent to prosecute. The prosecution of the applicants by the DCEO was triggered by the statutory consent of the DPP that the DCEO, as a prosecuting authority, can proceed to charge and prosecute the applicants. Thus, unlike a public prosecutor who exercises delegated powers of the DPP under section 6 of CP&E Act, the DCEO does not exercise delegated powers of the DPP to charge, but statutory powers under PC&EO. Consequently, the DCEO is not answerable to the DPP in discharge of its mandate, either to investigate or to prosecute.

[108] Secondly, the assertion that the DPP tendered evidence involving the applicants before the PAC is not borne out by Hansard. The DPP did not disclose the contents of the docket or tender evidence regarding the merits of the criminal investigations. She explained the process relevant to referral of cases to her office by investigating agencies and issuance of directives by her office. She disputed the DG's version that subsequent to the issuance of the 'directive', she instigated a review of the docket or that the docket was ever returned to her office. Therefore, I do not see how the DPP's testimony before the PAC could have offended the applicants' constitutional right to fair trial under the circumstances.

[109] The above factors bring into question the utility of the declaratory relief. This is compounded by the fact that the case is not prosecuted by the DPP, but by the DCEO. In the circumstances, I do not see the practical effect and the advantage the applicants will enjoy if I were to grant a declarator that the summoning of the DPP was contrary to section 12 read with section 99(6) of the Constitution.

[110] At the time she appeared before the PAC, the DPP had already considered the docket and issued her consent to prosecute. There is no evidence that either during or subsequent to her appearance before the PAC, the DPP did anything regarding the case or that she exercised her statutory functions in a manner inconsistent with the applicants' constitutional rights. For these reasons, prayer 7 in the notice of motion must fail.

Do the DCEO and the DPP account to the PAC over their mandate?

[111] The applicants contend that the PAC did not have jurisdiction to interrogate the DCEO in relation to their criminal case and that it interfered with the prosecutorial powers of the DPP. The preceding paragraphs highlight that the PAC must do investigations within its area of competence or responsibility. The PAC strayed from its mandate the minute it zoomed in

on the criminal investigations of the DCEO and asked the DG to account why the applicants have not been charged. This is how the discussions between the PAC and the DG ensued:

“MR. M. MANYOKLE: Thank you Mr Chair. I am Director General DCEO Manyokole. I don’t know where to start. First point I want to raise is that this case being referred to of the said man who is suspended is before the court where he has challenged his suspension. Will only say a bit in passing because the case is still pending before the court.

HON. CHAIRPERSON: Let’s do this. We are not talking about the case of Mr Mathibeli which is still pending in court. What we want you to talk about is that you are the Director General of CEO. Where justice needed to be served it was not so till thus far. Where investigations have been carried out on the fleets, the directive on those who are suspects have not appeared before the court because you took the docket as the head of DCEO who is supposed to help us deal with corruption in the country. Here are the suspects who are involved in bribery issues. Investigations have been completed and the directive issued and you decided to take the docket. We want to hear your responsibility that here the suspicion is that, you defeated the ends of justice.

If you can remember well, the first time you appeared before PAC, there was a concern that DCEO lately has turned into its owner’s dog used as a witch hunt for the interests of the owner to bite where the owner wants or just bark where the owner wants. Then you said that you are not a puppet of

politicians and these honourable members became very furious at such? Honourable Chief whip even said to you, you are now opening a can of worms. Now we want you to take off from our minds that you went to work for DCEO to serve as a puppet to defeat the ends of justice in the country. We need your responsibility on that one.

MR. M. MANYOKOLE: thank you chair. May I explain as Mr Thibeli has just said, there are two cases. There is a case he opened at the police Station against me. Also there is a case he lodged at the court against his suspension. Honourable chair, I am now going to freely speak...

HON. CHAIRPERSON: Director General DCEO, the question is over you defeating the ends of justice. Investigations have been made, directive issued, you have taken the docket and suspects have not appeared before the court, what's your take on that?

MR. M. MANYOKOLE: All of that is not true. May I please answer honourable chair. The docket did reach my office with the prosecutor Mr Nthabi for the review because I believe I have a prerogative by law to do that. Afterwards, Director Prosecution asked me to review that docket in question. I went to a meeting with her where she was going to make a review of the said docket and I even gave her my opinion regarding it and how I feel about it.

HON. CHAIRPERSON: Director General, you want to say to this parliamentary committee that under the leadership of Mr Matsoso maybe that was interjected by Mr Seema, investigations are made, directive is issued then the person who asks for the review of the case at that time is not aware of such a review? It is only

when you arrive asking for the review to be made? Is that exactly what you mean before this committee?

MR. M. MANYOKOLE: I want us to correct this. You are saying two things. You are saying as the Director General you did make a review? You are saying again that you have the Prerogative by law to review also in the same statement you again say Director of Public Prosecution said she wanted to do a review the same case? Is it the Director of Public Prosecution who ordered you to take the docket to her for review or it's you who chose to review the docket?

MR. M. MANYOKOLE: All am saying is that the law supports me. One thing I want from DDP through the law is consent of the court. Such an instruction was given in the form of a directive.

HON. CHAIRPERSON: You have answered me.

MR. M. MANYOKOLE: thank you Mr chair. My name is Manyokole, Director General DCEO. Mr chair, I can reveal to you in camera, all am saying is that I have investigations going on. So I don't want these issues to jeopardize my investigations. I am not afraid to mention them because even witnesses are available who were there when I was instructed through a phone that I should go and charge a certain person over there who is violating the procurement procedures. A direct order was made in the office to officers who were...

HON. CHAIRPERSON: May I humbly ask fellow colleagues that we take note that he agrees to give me this information *in camera*. In your own analysis as the Director General, do you think here the procurement regulations have been followed as you were undertaking your review in these fleet of vehicles called “**Seoa-holimo**”?

MR. M. MANYOKOLE: thank you Mr chair. I have two kinds things now, this thing of “Seoa-hlimo” I don’t know it, I have only two types of procurement for vehicles which I have their case numbers but in particular...

HON. CHAIRPERSON: Let me remind you. There are a fleet of vehicles which followed due processes of procurement procedures. In the very same case, there also appeared vehicles from nowhere whose owners have paid bribe hence the investigations. Now my question to you is whether in your review, did such vehicles followed the procurement regulations?

MR. M. MANYOKOE: To these ones of bribe, I observed where Basotho men double cross each other there at Mejametalana, when one gave another money to go secure work for his vehicles. I learned that PS Finance will assist us on this one for she is the one who has been attracting people especially these ones with bribery. Then she said, go and secure their procurement. It was now after those vehicles have paid a certain sum of money, then became eligible to secure the hiring. While they were still on the process of allowing them in, then there came a whistleblower to the Director General DCEO Mr Matsoso that there is a suspicion of an alleged fraud to happen there. And that fleet of vehicles were then immediately removed from where they were suddenly. Now these people ended up double

crossing each other exchanging money on the streets without no receipts, without any officer from Finance even so unlawfully committing crime alone.

Now here where it involves procurement, I was going to be in the right position to speak that way. If through that way Finance would commit itself that such vehicles were lawfully allowed, I was then going to say there has been a violation of procurement procedure because I would be in the light that there was no tendering process followed for such vehicles to be there. There is no evidence from my assessment pointing that procurement procedures have been violated but when they do come, then it becomes a criminal offence.

HON. CHAIRPERSON: Okay. It is fine. Are you aware that on the statement given by ... or maybe the evidence given by Mr. PS in here he said his suspect is PS Finance for the first time she gave a statement in the right way? The second time when she was called she became very furious even telling Mr Thibeli to stop interfering and leave the matter to his boss Manyokole to be the one to handle it. What's your take on the matter?

MR. M MONYOKOLE: Thank you Mr chair. It is very wrong for the PS who was already under investigation when summoned to come to the office then she points at Manyokole. There was a report from her that Mr Thibeli is threatening and harassing her. That is why she indicated that she would not come to his office to be threatened by Mr Thibeli. I then said to her, "you have to come when you are summoned by the officer of law for you are now under my command." I did not influence her not to come. I told her that she has to comply because this man is

carrying out instructions under my supervision. But her understanding was that she thought it was only right for her to be summoned by myself given my level of position.

HON. CHAIRPERSON: Okay. Just a moment sir. Are you aware that all the evidence you gave us here from issues involving you from the PS Finance you ended up seeking review of that case because you were under the impression that there is a political agenda?

Are you aware again that the statement issued by Mr Thibeli that PS Finance refused to come on account that her matters be handled by you, do you agree with that? Are you also aware that all these which you have been saying did not end up happening but what is evident is that you played a cover up for the PS by taking the docket claiming to review it yet you did not but just to protect the PS? So you do agree with Mr. Thibeli that you do have affiliation with these two people: PS and Mr Tlokotsi, actually you withdrew the docket just to protect them. What's your take on this?

MR. M. MANYOKOLE: that is misleading information sir, and again even if this case can be allowed to be heard in court, God will defend me, you will see for yourself the truth pertaining to these two cases.

HON. CHAIRPERSON: How is it going to see its day in court while you have reviewed it?

MR. M. MANYOKOLE: Mr chair, I did not stop the case from going to court. Listen to my case, what the review means is that, I examine the case like any other as to whether the accused suspects are done so rightfully with full evidence substantial. I said to you before this committee that I agreed with the issue of the standing trail, I even went to DPP to go ahead with prosecution but the docket or the case should leave my office because now it is surrounded by a couple

of issues as if I am being biased against others. I said DPP should be the one to prosecute them.

HON. CHAIRPERSON:

What did you review in that case?

MR.M. MANYOKOLE:

Mr chair, one examines the evidence when doing review. I examined the evidence.

HON.CHAIRPERSON:

Yes, what did you review in that case?

MR.M. MANYOKOLE:

I examined the evidence Mr chair. I saw to it that the evidence is inside there do connect or not enough substantial against the PS Finance not Mr. Tlokotsi. Mr Tlokotsi's case is different from that of the PS Finance for there is no where it is said he should not be charged; we agree that he be charged.

HON. CHAIRPERSON:

Okay, am drawing to a close with you. What did you expunge in that case?

MR.M. MANYOKOLE:

nothing, there is nothing expunged. It went through as it is, there is nothing that I took.

HON. CHAIRPERSON:

Does it still stipulate that charges against PS Finance should go ahead as planned?

MR.M. MANYOKOLE:

It has everything sir. The Directive is still intact as it is, there is nothing that has been removed in there. It is still the same.

HON. CHAIRPERSON:

Mr Director General, but you have just said you did not find enough compelling evidence against the PS Finance to be charged?

MR.M. MANYOKOLE:

But I said I didn't take out anything, I thought you were asking whether everything was still in order, so I then said not temper with the evidence, everything is as it is.

HON.CHAIRPERSON:

Gentlemen, its your turn to ask questions, I have done my part.

HON. T. SEKATA:

Mr Chair, I was still on the floor for questioning.

HON. CHAIRPERSON: Yes, please.

HON. T. SEKATA Mr Director General, may I repeat the question once again sir. Are you saying you did not stop one of your officers from reporting to the police as per Mr Thibeli's version, that indeed you told him not to go, what were you doing by that?

MR.M. MANYOKOLE: through you Mr chair, I have never refused to release any of my officers to report themselves at the police station. Even Compol Mr Molibeli came to me with the same case for an interview in my office. I gave him all this information I am presenting before PAC, that sir, the case or docket is no longer in my possession but it is with the DPP. He then asked me whether I have interest in these cases and then I told him no. I took it away from me with the very same reason that is claimed that I have interest. I decided to get it out of my office so that he will go to deliberate and make a decision on it because even the directive issued was not done him but his prosecutorial officers. I told him the very things am telling you now even if you were to ask him, I haven't refused Mr Nthaby. I simply asked whether it is proper for police to just call a person without anything...

HON. CHAIRPERSON: Just excuse me for a minute. DG, you have just mentioned the name of a person which I wanted to come give evidence on her side. Are you saying DPP is the one who asked you to make a review on the case, is it really like that?

MR.M. MANYOKOLE: it is like that sir, I reiterate.

HON. CHAIRPERSON: Was it done in writing? Did she write to you?

MR.M. MANYOKOLE: No Mr chair, we did not do it in writing.

- HON. CHAIRPERSON: What kind of correspondence did you make? Such a huge office of the government has no written document where the agreement to forward a case is made for proof. How did you do it then?
- MR. M. MANYOKOLE: Mr chair, when I arrived there, there was no material to write on but what transpired is that she called me and I went to her office for a meeting about the file.
- HON. CHAIRPERSON: At least who are we referring to here?
- MR. M. MANYOKOLE: The DPP?
- HON. CHAIRPERSON: The person who called you, who has interest to call you to come talk about the file. That person has to come and give their version of events. Who is that person?
- MR. M. MANYOKOLE: DPP of Lesotho here, Miss Hlalefang Motinyane.
- HON. CHAIRPERSON: Meaning Miss Hlalefang Motinyane is the one who called you to her office to come bring the case for review?
- MR. M. MANYOKOLE: That's correct Mr chair.
- HON. CHAIRPERSON: Is it really like that?
- MR. M. MANYOKOLE: I attest to that Honourable chairperson.
- MR. M. MANYOKOLE: (DG, DCEO) ... as I was saying earlier to honourable T. Sekata, that I wish to respond to his question for clarity mr chair.. Mr Nthabi did report to me that he was summoned by the police and my question to him was it is surprising because they have written for me informing me about your summoning, I then told him to inform them to correspond with me through writing so that I may not wonder of your whereabouts in the DCEO yard. That is what I said to him. I did not refuse to release him to the police.
- HON. L. MAHASE(Khubetsoana): Honourable Chairperson, DCEO and the police have an MOU. Is it really necessary

that there should be any correspondence when dealing with these public matters?

MR.M. MANYOKOLE: Mr Chairperson, it is not correspondence per say. He can still call me to come and explain myself. But I haven't laid my eyes on the MOU. Maybe it is new to me. I do know that is there but I really haven't looked into it and the process thereof.

HON. CHAIRPERSON: Honourable members, are you aware this issue has been fully exhausted? Right now we are left to get the side of the DPP as to whether she did call DG for him to bring the case for that review as our starting point. The second issue is for DPP to come and assist us on what was her interest. She has come assist us that as she had already given out a directive, why did she want to make review the very directive she issued herself? Why from the onset did she not refuse to take that case due to insufficient evidence? Why couldn't she say Thibeli with his team should go back to do more investigations? Our evidence is just on that issue alone. But if there is anything you feel needs to be included gentlemen, you can go ahead and ask. But it my conviction that this issue exhausted.

HON.N. KAYA (MECHECHANE): Honourable, you are right we have exhausted this issue but I just want to ask one question here to DG DCEO. Was it a coincidence that this case was already over and ready to go to court? For it to come back for review by him and DPP, was that a mere coincidence that it happened that way?

HON. CHAIRPERSON: DG, was it a coincidence?

MR.M. MANYOKOLE: Honourable, I want to understand well, I didn't see it as a coincidence."

[112] It is clear from the encounter that the PAC 's expectation was that the suspects should have been charged taking into account when the directive was issued. Their understanding, and that of the DPP, was that the DG was obliged to implement the 'directive'. However, it does not appear that the PAC directed the DG to charge the suspects.

[113] The 'directive' had been issued in July 2019, but the applicants were only arraigned on 4th November 2019, a few days after the DG's appearance before the PAC. The DG attributed the delay to the fact that the DPP asked him to review the docket and that he handed over the prosecution to the DPP as he was accused on having interest in the case. The DPP hotly disputed this version. It is the DCEO which arraigned the applicants before the learned Magistrate contrary to the DG's version that he had handed the case back to the DPP.

[114] It is pellucidly clear that for whatever reason, the DG was reluctant to have the applicants charged. The deliberations of the PAC exposed the DG, hence he had no option, but to ensure that the applicants were charged. However, this does not necessarily taint the decision to charge the applicants. The decision to prosecute can only be reviewed on limited grounds. In **National**

Director of Public Prosecutions v. Freedom under Law⁴² *Brand JA* set out the following policy that underlie limited grounds for reviewing decisions to prosecute:

“First, that of safeguarding the independence of the prosecuting authority by limiting the extent to which review of its decisions can be sought. Secondly, the great width of the discretion to be exercised by the prosecuting authority and the polycentric character that generally accompanies its decision-making, including considerations of public interest and policy.”

[115] My learned brother, *Sakoane CJ*, had the occasion to discuss limited grounds for reviability of the decision to prosecute in **Metsing and Another v Attorney General and others (No.2)**⁴³ where he said the following:

“[18] The subjective determination of the requisite factors in section 144 forms part of the decision-making process to prosecute conferred by the Constitution. This decision-making process is not amenable to review except on the limited grounds of *mala fides*, corruption, failure to apply the mind and breach of promise not to prosecute as pointed out by *Harms DP* in **National Director of Public Prosecutions v. Zuma**:

“[37] A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, something not alleged by Mr. Zuma and which in any event can only be determined once criminal proceedings have been concluded. The motive behind the prosecution is irrelevant because, as *Schreiner JA* said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions.

[38] This does not, however, mean that the prosecution may use its powers for ‘ulterior purposes’. To do so would breach the principle of legality. The facts in

⁴² 2014(4) SA 298 (SCA) at para 25.

⁴³ [2021] LSHC 123 Civ (18 November 2021)

Highstead Entertainment (Pty) Ltd t/a “The Club” v Minister of Law and Order and Others 1994 (1) SA 387 (C) illustrate and explain the point. The police had confiscated machines belonging to Highstead for the purpose of charging it with gambling offences. They were intent on confiscating further machines. The object was not to use them as exhibits – they had enough exhibits already – but to put Highstead out of business. In other words, the confiscation had nothing to do with the intended prosecution and the power to confiscate was accordingly used for a purpose not authorised by the statute. This is what ‘ulterior purpose’ in this context means. That is not the case before us. In the absence of evidence that the prosecution of Mr. Zuma was not intended to obtain a conviction the reliance on this line of authority is misplaced as was the focus on motive.

[39] Courts have also interfered with decisions to prosecute in circumstances where the prosecuting authorities had given an undertaking not to prosecute or had made a representation to that effect in exchange for a plea or for co-operation. The prosecuting authority has been kept to its bargain.”

[116] The House of Lords in **R (on the application of Corner House Research and others**⁴⁴) said the follow regarding applicability of these principles on the decisions of the DG:

“30. It is common ground in these proceedings that the Director is a public official appointed by the Crown but independent of it. He is entrusted by Parliament with discretionary powers to investigate suspected offences which reasonably appear to him to involve serious or complex fraud and to prosecute in such cases. These are powers given to him by Parliament as head of an independent, professional service who is subject only to the superintendence of the Attorney General. There is an obvious analogy with the position of the Director of Public Prosecutions. It is accepted that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator: *R v Director of Public Prosecutions, Ex p C* [1995] 1 Cr App R 136, 141; *R v Director of Public Prosecutions, Ex p Manning* [2001] QB 330, para 23; *R (Birmingham and others) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2007] QB 727, paras 63-64; *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20,

⁴⁴ R (on the application of Corner House Research and others) v. Director of the Serious Fraud Office [2008] UKHL 60 (30 July 2008)

[2006] 1 WLR 3343, paras 17 and 21 citing and endorsing a passage in the judgment of the Supreme Court of Fiji in *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712, 735-736; *Sharma v Brown-Antoine and others* [2006] UKPC 57, [2007] 1 WLR 780, para 14(1)-(6). The House was not referred to any case in which a challenge had been made to a decision not to prosecute or investigate on public interest grounds.

31. The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised (as it was described in the cited passage of *Matalulu*)

‘the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the court to assess their merits’.

Thirdly, the powers are conferred in very broad and unrestrictive terms.

32. Of course, and this again is uncontroversial, the discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice. In the present case, the claimants have not sought to impugn the Director’s good faith and honesty in any way.”

[117] These principles were also expounded on by the Privy Council in **Sharma**⁴⁵

as follows:

“The rule of law requires that, subject to any immunity or exemption provided by law, the criminal law of the land should apply to all alike. A person is not to be singled out for adverse treatment because he or she holds a high and dignified office of state, but nor can the holding of such an office excuse conduct which would lead to the prosecution of one not holding such an office. The maintenance of public confidence in the administration of justice requires that it be, and be seen to be, even-handed.

⁴⁵ *Sharma v. Deputy Director of Public Prosecutions & Ors* (Trinidad and Tobago) [2006] UKPC 57 (30 November 2006) para 14

It is the duty of police officers and prosecutors engaged in the investigation of alleged offences and the initiation of prosecutions to exercise an independent, objective, professional judgment on the facts of each case. It not infrequently happens that there is strong political and public feeling that a particular suspect or class of suspect should be prosecuted and convicted. Those suspected of terrorism, hijacking or child abuse are obvious examples. This is inevitable, and not in itself harmful so long as those professionally charged with the investigation of offences and the institution of prosecutions do not allow their awareness of political or public opinion to sway their professional judgment. It is a grave violation of their professional and legal duty to allow their judgment to be swayed by extraneous considerations such as political pressure.

It is well-established that a decision to prosecute is ordinarily susceptible to judicial review, and surrender of what should be an independent prosecutorial discretion to political instruction (or we would add, persuasion or pressure) is a recognised ground of review: *Matalulu*, above, pp 735-736; *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20, paras 17, 21. It is also well-established that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy. The language of the cases shows a uniform approach: ‘rare in the extreme’ (*R v Inland Revenue Commissioners, Ex p Mead* [1993] 1 A11 ER 772, 782); ‘sparingly exercised’ (*R v Director of Public Prosecutions, Ex p C* [1995] 1 Cr App R 136, 140); ‘very hesitant’ (*Kostuch v Attorney General of Alberta* (1995) 128 DLR (4th) 440, 449); ‘very rare indeed’ (*R (Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin), [2004] Imm AR 549, para 49); ‘very rarely’ (*R (Birmingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2006] 3 A11 ER 239, para 63. In *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 371, Lord Steyn said:

‘My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review’”

The courts have given a number of reasons for their extreme reluctance to disturb decisions to prosecute by way of judicial review. They include:

- (i) ‘the great width of the DPP’s discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits’ (*Matalulu*, above, p 735, cited in *Mohit*, above, para 17);
- (ii) ‘the wide range of factors relating to available evidence, the public interest and perhaps other matters which [the prosecutor] may properly

take into account' (counsel's argument in *Mohit*, above, para 18, accepting that the threshold of a successful challenge is 'a high one');

(iii) the delay inevitably caused to the criminal trial if it proceeds (*Kebilene*, above p 371; *Pretty*, above para 77);

(iv) 'the desirability of all challenges taking place in the criminal trial or on appeal' (*Kebilene*, above, p 371; and see *Pepushi*, above, para 49). In addition to the safeguards afforded to the defendant in a criminal trial, the court has a well-established power to restrain proceedings which are an abuse of its process, even where such abuse does not compromise the fairness of the trial itself (*R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994]1 AC 42). But, as Lord Lane CJ pointed out with reference to abuse applications in *Attorney-General's Reference (No 1 of 1990)* [1992] QB 630, 642,

'we should like to add to that statement of principle by stressing a point which is somewhat overlooked, namely, that the trial process itself is equipped to deal with the bulk of complaints which have in recent Divisional Court cases founded applications for a stay.'

(iv) the blurring of the executive function of the prosecutor and the judicial function of the court, and of the distinct roles of the criminal and the civil courts: *Director of Public Prosecutions v Humphrys* [1977] AC 1, 24, 26, 46, 53; *Imperial Tobacco Ltd v Attorney-General* [1981] AC 718, 733, 742; *R v Power* [1994] 1 SCR 601-623; *Kostuch v Attorney-General of Alberta*, above, pp 449-450; *Pretty*, above, para 121."

[118] The applicants' case is not grounded on the limited grounds of dishonesty, mala fides, corruption, breach of promise not to prosecute and failure to apply the mind.

[119] I agree with the applicants that the PAC has no jurisdiction to interrogate and or probe issues that have to do with investigations of the DCEO. It bears repeating, looking at the turn of events, in particular that the applicants were charged a few days following the appearance of the DG before the

PAC, the suggestion that the DG was under pressure to charge the applicants is not far fetched. However, that is not sufficient to justify a review of the decision to charge. The DG still exercised his prosecutorial discretion hence not all the suspects were charged. Besides, though Hansard is not elegantly transcribed in this regard, it is clear from his engagement with the Chair of the PAC that the DG was of the view that there was no sufficient evidence against the Principal Secretary, Mrs. *Motena*. This could explain why she was not charged.

[120] I now turn to consider whether the PAC interfered with the prosecutorial powers of the DPP. I have already found that the PAC exceeded its investigative mandate when it asked the DPP to account to it in relation to discharge of her constitutional mandate. However, I am unable to find that the PAC interfered with prosecutorial powers of the DPP in this case.

[121] The applicants' complaint that the PAC interfered with prosecutorial powers of the DPP must be interrogated in the context of PAC's deliberations. A factual dispute on this issue calls for invocation of the **Plascon-Evans**⁴⁶ rule. There is nothing in the papers to ground the applicants' allegation that the PAC interfered with DPP's prosecutorial functions. The PAC did not direct

⁴⁶ Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

the DPP how she should or should not exercise her prosecutorial powers in relation to the applicants' case.

[122] It cannot be emphasized enough that at the time she appeared before the PAC, the DPP had already issued statutory consent that the applicants and other co-suspects be charged. More tellingly, the prosecution is not at the instance of the DPP, but at the instance of the DCEO. Thus, any attack, based on the alleged interference with the DPP's prosecutorial powers, which purportedly happened subsequent to issuance of statutory consent, is misplaced.

[123] Besides, we are told in the **National Director of Public Prosecutions v Zuma**⁴⁷ that:

“A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent ... which in any event can only be determined once criminal proceedings are concluded. The motive behind the prosecution is irrelevant ...”

[124] Mr. *Zuma* was complaining that there had been political interference in the decision not to prosecute him which then tainted the subsequent decision to

⁴⁷ 2009(2) SA 277 (2) (SCA) at para 37

prosecute him. This *dictum* was cited with approval in **Joao Rodrigues v The National Director of Public Prosecutions & Others**⁴⁸.

Is prosecution of the applicants to the exclusion of co-suspects interference with DPP's prosecutorial powers?

[125] The decision of the DCEO to charge the applicants to the exclusion of other co-suspects named in the DPP's directive is under attack. The applicants' contention is that the decision is tantamount to interference with the powers vested in the DPP, hence unconstitutional. The attack is patently misplaced. The applicants are under the misapprehension that the DCEO or DG are agents of the DPP. The DCEO or DG are not officers subordinate to the DPP as envisaged in section 99 (3) of the Constitution. Thus, they do not exercise their prosecutorial functions under DPP's general or specific instructions.

[126] The DCEO is a prosecuting authority in terms of section 6(1)(e) of the PC&EO Act. All that is required of it in terms of section 43 (2) of the Act is to obtain a written consent from the DPP for prosecution of offences under Part IV or V of the Act. Provision of a written consent is triggered by

⁴⁸ [2021] 3 ALL SA 775

referral to DPP where investigations disclose an offence under Part IV or V. Absent the consent, the DCEO is barred from instituting criminal proceedings. The fact that the DCEO needs a written consent from the DPP to prosecute certain offences, does not detract from the fact that the DCEO is a prosecuting authority. In fact, it prosecutes offences under sections 17, 18 and 19 of the PC&EO Act without a consent from the DPP.

[127] In terms of section 99(4) of the Constitution, it is only the powers to take over and continue criminal prosecution instituted by any other person or authority, as well to discontinue criminal proceedings instituted or undertaken by her or any other person or authority, that are exclusively reserved for the DPP and the Attorney General. However, this does not bar a person or an authority that institutes criminal proceedings, to withdraw them with leave of court in terms of a proviso to the section.

[128] The applicant 's case is anchored on the alleged interference with the DPP's prosecutorial functions by the DCEO or the DG. Contrary to the 'directive' from the DPP, the DCEO only charged the applicants and left out other three co-suspects, so asserts the applicants. The DG counters by saying that the DPP's consent is permissive and not binding on the DCEO to charge all

persons mentioned therein and that the non-inclusion of other suspects in the charge has no impact on the fairness of the process.

[129] The DG asserts that the DPP and the DCEO “are both prosecuting authorities and it will be absurd if 1st Respondent [DPP] can choose who to prosecute on the basis of evidence at hand and 2nd Respondent [DCEO] cannot do the same.”⁴⁹

[130] A decision to jointly charge and prosecute persons implicated in the same offence belongs to the prosecutor in terms of section 140 of the CP&E Act.

The section reads as follows:

- “140. (1) Any number of persons charged with –
- (a) committing or with procuring the commission of the same offence, although at different times, or with having after the commission of the offence, harboured or assisted the offence; or
 - (b) receiving, although at different times, any property which has been obtained by means of an offence or any part of any property so obtained, **may be charged with substantive offences in the same charge and may be tried together**, notwithstanding that the principal offender or the person who obtained the property is not included in the same charge or is not amenable to justice.
- (2) A person who –
- (a) counsels or procures another to commit an offence; or
 - (b) aids another person in committing an offence; or
 - (c) after the commission of an offence harbours or assists the offender, **may be charged in the same charge with the principal offender and may be tried with him or separately or may be charged and tried separately** whether the principal offender has or has not been convicted, or is not amenable to justice.
- (3) Whenever any person in taking part or being concerned in any transaction commits an offence and any other person in taking part or being concerned in the same transaction commits a different

⁴⁹ Pleadings, page 201 – Manyokole’s Answering Affidavit, para 7

offence, both such persons **may be charged with such offences in the same charge and may be tried thereon jointly.**”

[131] The highlighted words in this section are couched in permissive, directory and not mandatory terms. The legislature has been sensitive to the fact that the decisions to charge or not to charge and the number of persons to join in a charge are of a polycentric character and guided by the available public interest and considerations. And as said by Lord Bingham of Cornhill in **R v. Director of Public Prosecutions ex parte Manning**⁵⁰:

“... In most cases the decision will turn not on any analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So, the courts will not easily find that a decision not to prosecute is bad in law...”

[132] This section must be read with section 154 (1) (e) which provides that:

“No charge in respect of any offence shall be held insufficient –

.....

(e) for want of, or imperfection in addition of any accused or any other person; ...”

⁵⁰ [2000]3 WLR 463 at 474

[133] In **Rex v. Sole and others**⁵¹, *Cullinan* CJ agreed with the comment of the learned authors, *Etienne Du Toit et. al.*⁵² that in terms of section 154 (1) (e), a charge is not invalid because of non-addition of an accused. It applies to non-joinder or insufficient joinder. I respectfully share the agreement of the learned Chief Justice and wish to add that section 154 (1) (e) authorises a joint trial only in circumstances provided in section 140.⁵³

[134] The question that then arises is whether non-addition of other persons in the charges is an objectionable irregularity to the charge. The answer must be in the negative. This negative answer illuminates the essence of the applicants' complaint, which is that it is not about the insufficiency of the number of accused to be charged but an allegedly selective and arbitrary decision by the DG not to add them to the charge. Viewed this way, the applicants run into a cul-de-sac of unreviewability of the exercise of prosecutorial powers where no ulterior purpose, *mala fides*, corruption or failure to apply the mind or breach of promise are pleaded. At the forefront of the applicants' case is the assertion that the decision of the Director General was not made independently but at the behest of the PAC. But this assertion has no foundational basis in the Hansard.

⁵¹ CRI/T/111/99 [2001] LSCA 19 (26 February 2001)

⁵² Commentary on the Criminal Procedure Act, 3rd Reprint 1993 (Original Service 1987) p.14-36

⁵³ R v. Makaya 1930 TPD 363

[135] It is not for this Court to direct the DCEO how to exercise its section 140 powers under the CP&E Act. To do so would be tantamount to judicial diktat. Ours is to protect the rule of law by upholding the constitutional imperatives that the exercise of prosecutorial power must be for the proper purpose of holding accused persons to account for their alleged criminal conduct through fair trials by independent courts.

[136] It must be remembered that during his interaction with the Chair of the PAC, the DG had indicated that evidence was insufficient against the Principal Secretary, Mrs. *Motena*. He also made mention of continuing investigations which he did not want to jeopardize. Though it is not clear which investigations were these, Ms. *Kuoe* told this Court during argument that Mmes. *Mafusi Mosamo* and *Motena Tsolo* were joined to the charge and remanded at a later stage. As a result, only Mrs. *Likeleli Tampane* had not been charged when the matter was argued.

Any danger of the trial being unfair as a result of non - joinder?

[137] The proposition advanced is that the non-joinder of the said co- suspects in the charges is selective and exposes the applicants to an unfair trial contrary to section 12 of the Constitution. In other words, it is contended that it is

unfair to hold the applicants criminally accountable to the exclusion of their alleged co-perpetrators. The applicants have not shown how any of the bundle of rights under section 12 of the Constitution are threatened or violated by non-joinder of the other suspects who the DPP directed that they also be charged. In other words, it is contended that it is unfair to hold the applicants criminally accountable to the exclusion of their alleged co-perpetrators.

[138] The proposition rests on a fallacy. A “charge” is an official notification to a person by the prosecuting authority that he is to be prosecuted for a stated offence⁵⁴. Non-joinder in a charge does not, without more, expose an accused person to an unfair trial. Section 12 (1) reads: “If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.” The fair hearing imperative kicks in when the trial commences and not before. Before commencement of trial, the fair hearing imperative does not apply. That is not to say circumstances may not arise where pre - trial prejudices are so grave as to result into miscarriage of justice.

⁵⁴ Kamansinski v. Anstria [1989] ECHR 24 (19 December 1989); R v Gibbons [1997] 2 NZLR 585

[139] It is, of course, in the interests of society as well as justice that alleged perpetrators of the same crime be tried jointly to enable the court to have all the evidence placed before it as well as to avoid delays and wastage of Crown resources. However:

“[47] The fact that there might often be cogent reasons for the holding of joint trials, does not of course mean that a specific trial would be unfair because other possible perpetrators are not charged together with an accused. The ultimate question is whether a particular trial was unfair; ...”⁵⁵

[140] As said by *Melunsky* JA in **Ntaote**⁵⁶ (supra) at para [10]:

“... In *Key v. Attorney-General, Cape Provincial Division and Another* 1996 (4) SA 187 (CC) at 195-6, para [13] Kriegler J enunciated that while an accused person must be given a fair trial, fairness is an issue which has to be decided upon the facts of each case. It follows, of course, that prejudice that an accused might suffer should generally be decided upon the facts at trial. Such prejudice must be trial-related and not fanciful or speculative. See *S v. The Attorney-General of the Western Cape; S v. Regional Magistrate, Wynberg and Another* 1999 (2) SACR 13 (C) at 25-26 ...”

[141] However, this does not mean that the trial court should, when called upon, shy away from judging whether the very institution of criminal proceedings is fair, irrespective of how fairly the trial may be conducted. As pointed out by Lord Griffiths in **R v. Horseferry Road Magistrates’ Court, ex parte Bennet**⁵⁷ the reason why the court has the power to interfere with the

⁵⁵ S v Shaik And Others 2008 (2) SA 208 (CC)

⁵⁶ Footnote 15

⁵⁷ [1994]1 AC 42 (HL) at 62

prosecution “is because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.” And as articulated by Professor Steytler⁵⁸:

“Where a prosecution is based on a violation of the Constitution, or the very institution of the prosecution itself constitutes such a violation, the result may be a substantively unfair trial where, in the clearest of cases, the staying of the prosecution would be the appropriate remedy.”

[142] Examples abound of prosecutions that violate the Constitution and also constitute an abuse of process unacceptable in courts of law:

- Instituting a prosecution without reasonable grounds. This violates a person’s right to be left alone; the process tarnishes and degrades his dignity by being labelled an accused and also forces him to engage services of a lawyer at considerable financial expense⁵⁹:
- Charging an accused person in the face of an undertaking, promise or representation by the police,

⁵⁸ Constitutional Criminal Procedure (Butterworths) p.219

⁵⁹ Scagell And Others v. Attorney-General of the Western Cape 1996 (11) BCLR 1446 (CC) paras [16]-[18].

prosecuting authority or Minister of Justice that he would not be prosecuted⁶⁰.

- Abduction of an accused person from a foreign jurisdiction by agents of the state. Such conduct violates freedom of movement, security and is in conflict with the state's international obligations⁶¹.
- Unreasonable delay in prosecuting criminal charges. Such delays are often caused by lack of diligence and insensitivity for the rights of accused persons. They greatly prejudice not only the accused but also the public interest in having expeditious trials while events are fresh in the memories of witnesses and the accused⁶².
- Mala fide actions and unethical conduct by the prosecution tarnish the integrity of the Director of Public Prosecutions and public prosecutors. Such conduct foul the constitutional standard of fairness⁶³.

[143] The above examples are not exhaustive as the ingenuity of man cannot be anticipated in all cases. But they all speak to the vigilance of judicial

⁶⁰ Phaila v. Minister of Defence And Others LAC (2013-2014) 401

⁶¹ S v. Ebrahim 1991(2) SA 553 (A); S v. December 1995 (1) SAC 438 (A); S v. Beahan 1990 (1) SACR 307 (ZS).

⁶² Director of Public Prosecutions and Another v. Lebona LAC (1995-99) 474; Ketisi v. Director of Public Prosecutions LAC (2005-2006) 503.

⁶³ Steytler op.cit p. 221

officers to abuses of court processes. Accountability for every criminal behaviour and its punishment is a rule of law imperative that must be given effect to fairly by all law enforcement agencies. And as said in **Sharma**⁶⁴:

“14 ... (1) The rule of law requires that, subject to any immunity or exemption provided by law, the criminal law of the land should apply to all alike. A person is not to be singled out for adverse treatment because he or she holds a high and dignified office of state, but nor can the holding of such an office excuse conduct which would lead to the prosecution of one not holding such an office. The maintenance of public confidence in the administration of justice requires that it be, and be seen to be, even-handed.

(2) It is the duty of police officers and prosecutors engaged in the investigation of alleged offences and the initiation of prosecutions to exercise an independent, objective, professional judgment on the facts of each case. It not infrequently happens that there is strong political and public feeling that a particular suspect or class of suspect should be prosecuted and convicted. Those suspected of terrorism, hijacking or child abuse are obvious examples. This is inevitable, and not in itself harmful so long as those professionally charged with the investigation of offences and the institution of prosecutions do not allow their awareness of political or public opinion to sway their professional judgment. It is a grave violation of their professional and legal duty to allow their judgment to be swayed by extraneous considerations such as political pressure.”

[144] In conclusion, the DCEO or the DG did not interfere with DPP’s prosecutorial powers in charging only the applicants at the initial stage. Rather, the DCEO was exercising its own prosecutorial powers and not those of the DPP. The DCEO’s exercise of its prosecutorial powers in this regard did not offend any provision of section 99 of the Constitution.

⁶⁴ Footnote 45

Is prosecution of the applicants to the exclusion of co – suspects discriminatory, hence unconstitutional and unlawful?

[145] Contrary to the directive that the applicants be charged with other co-suspects named therein, only the applicants were charged. In terms of Article 1(3) of the United Nations Charter 1945, the United Nations aims at promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. This is reinforced by Article 2 of the Universal Declaration of Human Rights 1948 which provides that everyone is entitled to the rights and freedoms in the Declaration without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Likewise, Article 2 of the International Covenant on Civil and Political Rights, 1966 as well as regional human rights instruments also guarantee human rights and proscribe discrimination.

[146] Similarly, the 1993 Constitution proscribes discrimination. The relevant provisions read as follows:

“Freedom from discrimination

“18. (1) Subject to provision of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsection (6), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this section, the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

(4)...”

[147] Cautions of the warning that the use of foreign precedent requires circumspection, I take a detour to once again consider how selective prosecution has been defined in other jurisdictions. In **United States v. Armstrong**⁶⁵ the court held that to establish discriminatory effect of federal prosecuting policy in a race case, the claimant must show that the policy “had a discriminatory effect and that it was motivated by a discriminatory purpose”. The claimant had to demonstrate that similarly situated individuals of a different race were not prosecuted.

[148] In **David Alan Wayne v. United States**⁶⁶ the Supreme Court stated that though prosecutorial discretion is broad, it is not unfettered and that selectivity in the enforcement of criminal laws was subject to constitutional

⁶⁵ 517 U.S 456 (1996) 456 at 465

⁶⁶ 470 US 598 (1985) 547 at 556

constraints. Importantly, the court said that the decision to prosecute may not be based upon unjustifiable standard such as race, religion or other arbitrary classification. In both **Wayte** and **Amstrong**, *supra*, the court judged selective prosecution claims according to the ordinary equal protection standards.

[149] I now turn to Article 14 of the European Convention of Human Rights. It is similar to section 18 of the Constitution regarding grounds for prohibited differentiation. Article 14 provides as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

[150] It is clear that Article 14 compliments other substantive provisions of the Convention. Unlike section 18 of the Constitution, Article 14 has no independent existence. It has effect in relation to enjoyment of the rights and freedoms safeguarded in other provisions of the Charter. However, application of Article 14 is not necessarily dependent on the violation of the substantive rights in the Convention as it can be applied on its own. Be that as it may, jurisprudence of the European Court of Human Rights on Article 14 remains relevant for present purposes.

[151] In **Carson and Others v. The United Kingdom**⁶⁷ the court recognised that the scope of the words “other status” goes beyond inherent personal characteristics or deeply held conviction or belief to include for instance, in certain circumstances a distinction drawn on the basis of a place of residence.

[152] The following paragraphs in **Clift v. The United Kingdom**⁶⁸, still a matter of the European Court of Human Rights, are instructive as well:

“55. Article 14 does not prohibit all differences in treatment but only those differences based on an identifiable, objective or personal characteristic, or “status”, by which persons or groups of persons are distinguishable from one another (see *Kjeldsen Busk Madsen and Pedersen*, cited above, § 56; *Berezovskiy v. Ukraine* (dec.), no. 70908/01, 15 June 2004; and *Carson and Others*, cited above, §§ 61 and 70). Article 14 lists specific grounds which constitute “status” including, inter alia, sex, race and property. However, the list set out in Article 14 is illustrative and not exhaustive, as is shown by the words “any ground such as” (in French “notamment”) (see *Engel and Others*, cited above, § 72; and *Carson*, cited above, § 70) and the inclusion in the list of the phrase “any other status” (in French “toute autre situation”). In the present case, the treatment of which the applicant complains does not fall within one of the specific grounds listed in Article 14. In order for the applicant's complaint to be successful, he must therefore demonstrate that he enjoyed some “other status” for the purpose of Article 14.

56. The Court recalls that the words “other status” (and a fortiori the French “toute autre situation”) have generally been given a wide meaning (see *Carson*, cited above, § 70). The Government have argued for a more limited interpretation, calling in particular for the words to be construed *eiusdem generis* with the specific

⁶⁷ [2008] ECHR 1194

⁶⁸ [2010] ECHR 1106

examples listed in Article 14. The Court observes at the outset that while a number of the specific examples relate to characteristics which can be said to be “personal” in the sense that they are innate characteristics or inherently linked to the identity or the personality of the individual, such as sex, race and religion, not all of the grounds listed can be thus characterised. In this regard, the Court highlights the inclusion of property as one of the prohibited grounds of discrimination. This ground has been construed broadly by the Court: in *James and Others v. the United Kingdom*, 21 February 1986, § 74, Series A no. 98, the difference in treatment of which the applicant complained was between different categories of property owners; in *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, §§ 90 and 95, ECHR 1999-III, the difference was between large and small landowners. In both cases, the Court accepted that the provisions of Article 14 were applicable.

57. As to its interpretation of “other status”, it is unsurprising that the Court has considered to constitute “other status” characteristics which, like some of the specific examples listed in the Article, can be said to be personal in the sense that they are innate or inherent. Thus in *Salgueiro da Silva Mouta*, cited above, § 28, it found that sexual orientation was “undoubtedly covered” by Article 14 and in *Glor v. Switzerland*, no. 13444/04, § 80, ECHR 2009-..., it held that physical disabilities fell within the phrase “other status”.
58. However, in finding violations of Article 14 in a number of other cases, the Court has accepted that “status” existed where the distinction relied upon did not involve a characteristic which could be said to be innate or inherent, and thus “personal” in the sense discussed above. In *Engel and Others*, cited above, the Court held that a distinction based on military rank could run counter to Article 14, the complaint in that case concerning a difference in treatment as regards provisional arrest between officers on the one hand and non-commissioned officers and ordinary servicemen on the other. In *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, § 64, Series A no. 222, the Court found a violation where there was a difference in treatment between the applicants and other holders of planning permissions in the same category as theirs. Although the Court did not specifically address the question of the relevant “status” in that case, it would appear that the distinction of which the applicants complained was between holders of outline planning permission who benefited from new legislation and holders of outline planning permission who did not (in that case, by virtue of the fact that the applicants' planning complaint had already been determined by the Court and

that the outline planning permission had been found to be invalid – see § 26 of the judgment). In *Larkos v. Cyprus*, cited above, § 21, where the Court found a violation of Article 14 as a result of a distinction between tenants of the State on the one hand and tenants of private landlords on the other, the parties did not dispute that Article 14 applied and the Court saw no reason to hold otherwise. In *Shelley*, cited above, the Court considered that being a convicted prisoner could fall within the notion of “other status” in Article 14. In *Sidabras and Džiautas v. Lithuania*, cited above, again the Court did not specifically address the question of “other status” but in finding a violation of Article 14 and Article 8 implicitly accepted that status as a former KGB officer fell within Article 14. Most recently, in *Paulík v. Slovakia*, no. 10699/05, § 54, ECHR 2006-XI (extracts), the Court accepted that the applicant, a father whose paternity had been established by judicial determination, had a resulting “status” which could be compared to putative fathers and mothers in situations where paternity was legally presumed but not judicially determined.

59. The Court therefore considers it clear that while it has consistently referred to the need for a distinction based on a “personal” characteristic in order to engage Article 14, as the above review of its case-law demonstrates, the protection conferred by that Article is not limited to different treatment based on characteristics which are personal in the sense that they are innate or inherent. Accordingly, even if, as the Government contended, a *ejusdem generis* construction were appropriate in the present case, this would not necessarily preclude the distinction upon which the applicant relies.”

[153] One obvious difference between Article 14 and section 18 (3) is that the latter does not have the words “any grounds such as” which indicates that the list of prohibited grounds for discrimination is not exhaustive. Be that as it may, both the Article and the section have the words “or other status”.

[154] More tellingly, the common thread that permeates the judgments that are referred to in *Clift, surpa*, in relation to the words “other status” is that

though a number of specific examples in the Article relate to innate characteristics or those that are inherently linked to the identity or personality of the individual such as sex, race or religion, not all the grounds listed can be characterised as such. There is inclusion of property in the list as one of prohibited grounds of discrimination. Thus, the words have been given expanded meaning.

[155] Turning now to the case before us, it is imperative to consider jurisprudence in relation to section 18(3) in this jurisdiction. In **Lesotho National General Insurance v. Nkuebe**⁶⁹, the Court of Appeal stated that no further regard needed to be had to section 18 of the Constitution where no different treatment was afforded to claimants based on prohibited grounds in section 18(3). The claimants were challenging the constitutionality of sections 10(1) and (2) and 12(2) and (3) of the Motor Vehicle Insurance Order No. 26 of 1989 on the ground that they were inconsistent with sections 18 and 19 of the Constitution. The claimants conceded that section 10 of the Order was not discriminatory within the meaning of the expression in section 18(3) of the Constitution. This means that to offend the Constitution, differentiation must be based on any of the prohibited grounds under section 18 (3) of the Constitution.

⁶⁹ LAC (2000 - 2004) 877 at 886

[156] The Court of Appeal in **Road Transport Board and Others v Northern Venture Association**⁷⁰ reiterated that there is no discrimination where differentiation is not attributable to prohibited grounds in section 18(3) of the Constitution. It went further to say that section 18 proscribes differentiation for reasons attributable to status. Perhaps it was looking at the characteristics of the prohibited grounds. In both **Road Transport Board and Others** and **Lesotho National General Insurance, supra**, the Court of Appeal cautioned against mechanical application of decisions from South African courts without understanding material differences in the constitutions of the two countries.

[157] Fast-forward to 2016, the Court of Appeal had this to say in **Timothy Thahane and Others v. Specified Offices Defined Contribution Pension Fund and Others**⁷¹ regarding section 18 of the Constitution:

“[21] ...The definition of ‘discriminatory’ in section 18(3) makes it clear that section 18(1), does not prohibit differentiation per se. Section 18(1), prohibits different treatment of different persons, on the basis of one of the characteristics (race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) mentioned in section 18(3). The appellants do not rely on any of the specific characteristics expressly mentioned in sec 18 (3) but relies on the fact that the effect of section 6(2) as amended is that it purports to afford

⁷⁰ LAC (2005-2006) 64 at 70

⁷¹ (C of A (CIV) 4/2016) [2017] LSCA

different treatment to ‘persons in the same category attributable wholly or mainly to their status . . . it treats persons in the same circumstances differently.’ The appellants object to the difference in treatment between members of Parliament who have resigned, on the one hand, and those that have retired.

[22] The challenge based on section 18(1) and (3) of the Constitution cannot succeed. The differentiation between those that have retired and those that have resigned does not involve a distinction based on their status (*Lesotho General Insurance Co Ltd v Nkuebe*, LAC [2000-2004] 877 AT para 11-12). The distinction relates to persons of similar status, namely members of parliament whose tenure have come to an end in different ways. In *Road Transport Boards and Ors v Northern Venture Association*, LAC [2005-2006] 64 at paras 12-15, this court pointed out that section 18, proscribes differentiation for reasons attributable to status and that there is no discrimination in this sense where in a legislative scheme there is differentiation that is not attributable to one of the characteristics mentioned in section 18(3) or other status of the persons involved. As was pointed out by Mr Farlam on behalf of the first respondent, status in itself is not a prohibited ground of discrimination and that in the context, ‘or other status’ means an attribute related to status that is equivalent or analogous to, but not the same as the specific grounds mentioned. These might, for example, be marital status or sexual orientation.”

[158] In ***The Principal Secretary, Ministry of Public Service and Others v. Makhahliso Tsupane and 15 Others***⁷², *Van Der Westhuizen AJA*, delivering a separate concurring judgment stated that where the ground of the alleged discrimination is not established, it is unnecessary to proceed to the question whether differentiation amounted to constitutionally prohibited discrimination or was based on rational distinctions. He stated that the first hurdle for the applicants is to show which forbidden ground in the Lesotho Constitution applies to the treatment they received.

⁷² (C of A (CIV) 11/20) [2020] LSCA 25

[159] The following *dictum*⁷³ is instructive in demystifying the concept of discrimination under section 18(3) of the Constitution:

“Status?”

[64] The High Court stated that the two categories of secretaries had the same status, and then proceeded to find that the executive secretaries had been discriminated against because of their status. This statement either resulted from a grammatical or typographical error, or from a fundamental misdirection. In order for discrimination to enter the picture, their status had to be different. Black people cannot be discriminated against in favour of other black people based on race; women cannot be discriminated against in favour of other women based on sex; and Christians cannot be discriminated against in favour of other Christians based on religion. Discrimination based on race can happen between black and white people; on sex between women and men; and on religion between Christians and Muslims, for example.

[65] What was the status of the secretaries? How did the status of the executive secretaries differ from those of the ministerial secretaries? Neither the respondents nor the High Court made that clear. Normally the concept of status applies to, for example, marital status. In the workplace married women are often discriminated against because of the fear that they will get pregnant. In class-based societies social status, such as to which cast one belongs, may be relevant. Whether one was born inside wedlock, or outside - and thus “an illegitimate child” - is another example. Section 18(3) specifically uses the words “birth or other status ...”. It links status to birth and continues: “... whereby persons of another such description are 28 subject to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another description.

[66] Even if the two categories of secretaries belonged to different status groups, contrary to the expressed view of the High Court, I am unable to detect any status that would fall within the meaning of section 18(3). The fact that their contracts differed did afford them two different constitutionally recognized kinds of status on which discrimination is forbidden. Status based on the kind of one’s employment contract is very far from “analogous” to the grounds recognized in section 18(3). [67] Thus the executive secretaries failed to clear the first hurdle in their way.

⁷³ Ibid page 27 to 28

They did not bring themselves into the ambit of the equality clause of the Constitution. On this ground alone, the appeal must succeed.”

[160] *Mosito P* concurred with the Order proposed by *Musonda AJA* in the matter.

However, this was on the basis of the reasoning of *Van Der Westhuizen AJA* in paragraphs 66 and 67 of the judgment that the claimants had failed to cross the first hurdle in that they did not bring themselves into the ambit of the equality clause of the Constitution⁷⁴. The learned President deemed it not necessary to proceed to the question whether differential of the two categories of secretaries amounted to constitutionally prohibited discrimination or was based on rational distinctions.

[161] Finally, in **Moshoeshoe Molapo v. P.S Ministry of Communications, Science and Technology**⁷⁵, *Van Der Westhuizen AJA* reiterated that the claimant must show the ground mentioned in section 18(3) as prohibited or – as it is sometimes called – “forbidden”. He repeated once more that “one cannot be discriminated against in favour of someone with the same status, just as discrimination on the basis of race or sex cannot happen amongst people of the same race or sex. Differentiation between black people cannot be constitutionally prohibited race discrimination...”.

⁷⁴ *Ibid*, page 29, para 70

⁷⁵ (C of A (CIV) 02/20 [2021] LSCA 1

[162] Obviously, the common thread in the above decisions from the Court of Appeal is that for differentiation to be unconstitutional, it must be attributable to one of the grounds or characteristics prohibited in section 18(3) of the Constitution. This must be pleaded and established. If for instance differentiation is attributable to race, the claimant must show that other similarly situated individuals of a different race are not being subjected to the same disabilities or restrictions. This understanding is consistent with the one relied upon in **Amstrong**, *supra*.

[163] The applicants have indisputably not managed to bring their claim within section 18 of the Constitution. Nowhere in their papers do they allege that their differentiation is attributable to any of the proscribed or prohibited grounds in section 18(3) of the Constitution. Thus, the applicants have not established the ground for the alleged discrimination. As a result, that is the end of the enquiry as far as prayer 17 is concerned.

VII. DISPOSITION

[164] The applicants' case was anchored on the purported interference with the DPP's prosecutorial functions by the PAC and the DCEO or the DG. Another complaint related to the alleged selective and discriminatory

prosecution. Two positive findings are justifiable in favour of the applicants. Firstly, the summoning of the DPP by the PAC was *void ab initio*. Secondly, the PAC has no jurisdiction to interrogate the DCEO on issues related to its investigations or to interfere with prosecutorial powers of the DPP.

[165] However, considering all the circumstances relevant to this case, as I should⁷⁶, the declaratory orders sought by the applicants are not justifiable. At the time that the DPP appeared before the PAC, she had already issued her statutory consent for the applicants and their co-suspects to be charged. Thus, the appearance of the DPP before the PAC did not have a bearing on the prosecution of the applicants.

[166] I turn now to the basis of the attack regarding the purported interference with the DPP's prosecutorial powers by the PAC or the DCEO and its DG. The attack is misplaced. Firstly, the PAC or the DG did not direct the DPP on how to exercise her prosecutorial powers in relation to the applicants' criminal case. Secondly, the attack is actuated by a misapprehension that prosecutorial powers are exclusively reserved for the DPP. And that the

⁷⁶ Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 at 410 (CC)

prosecution of the applicants is at the instance of the DPP. The applicants are wrong on both accounts.

[167] The DCEO is clothed with prosecutorial powers in terms of section 6 (1)(e) of the PC&EO Act. The prosecution of the applicants is undertaken by the DCEO exercising its own statutory powers. Thus, the DPP's prosecutorial powers are of no moment in the prosecution of the applicants. The DPP's role ended the minute she considered the docket and decided to consent to prosecution. The only way her powers can come into play is if she were to invoke her constitutional powers and take over the prosecution or discontinue it.

[168] Lastly, the attack against the purported selective or discriminatory prosecution is unsupportable. The applicants have failed to bring their case within the ambit of section 18(3) of the Constitution. Meaning, their purported differentiation is not based on any of the prohibited grounds under the Constitution.

[169] It is for these reasons that this application falls to be dismissed so that the trial may proceed.

Costs

[170] The matter of costs remains. The general rule for an award of costs in constitutional litigation between a private party and the state is that if the private party is successful, it should have its costs paid by the State, and if unsuccessful, each party should pay its own costs⁷⁷. The case does not warrant a different treatment.

Order

[171] In the result the following order is made:

1. the application is dismissed;
2. each party to bear its own costs.

A.R. MATHABA
JUDGE

I agree

S.P. SAKOANE
CHIEF JUSTICE

⁷⁷ Trustees For the Time Being of Biowatch Trust v. Registrar, Genetic Resources & Others [2009] ZACC 14 page 26, para 43; Attorney General v. 'Mopa LAC (2000 – 2004) 427 at page 441

I agree

K.L. MOAHLOLI
JUDGE

For Applicants: Mr. C. Lephuthing & Mr M. Rasekoai

For 1st Respondent: Mr M. Rafoneke

For 2nd & 3rd Respondents: Ms T. Kuoane

For 4th to 9th Respondents: Mr M. Moshoeshoe